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WHAT RIGHTS ARE LEFT

BY

HENRY ALAN JOHNSTON

OF THE NEW YORK BAR

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NEW YORK

THE MACMILLAN COMPANY

1930

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Set up and printed. Published September, 1930.

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SET UP BY BROWN BROTHERS LINOTYPERS
PRINTED IN THE UNITED STATES OF AMERICA
BY THE CORNWALL PRESS

Grateful acknowledgment is made to my friends George Roberts, Courtlandt Nicoll and Howard Lee McBain for their kind assistance in the preparation of this little book.

H. A. J.

FOREWORD

Malum Prohibitum

"*IGNORANTIA juris neminem excusat.*" This legal maxim, sanctioned by centuries of experience, means literally, "Ignorance of the law excuses no one." It is not quite the same as saying, "Every one is presumed to know the law," for the layman is certainly not presumed to know; and even a lawyer who claims to know the law, without first looking it up in the books, is indulging in a violent presumption. If one is in doubt about the law he consults a lawyer; if he fails to take this precaution he cannot plead his ignorance as an excuse. That is what the maxim means.

Prohibitory laws, as a rule, are the embodiment of what people have learned from experience to be necessary or expedient for the public welfare and for the peace and dignity of the community. Most men living in a civilized state instinctively know that certain acts are bad and forbidden by law. They know that murder, robbery, arson, rape, perjury, counterfeiting, and other such acts (*mala in se*), are wrong. They know that such things are in all reason prohibited, and to this extent at least, "every one is

presumed to know the law." Such crimes are discovered, not made.

National Prohibition, however, is a departure from this general rule, in that acts which have been recognized as innocent and which from the earliest beginnings of civilization have been habitual with mankind, having become with many a regular part of their daily routine, are suddenly, by legislative action, made criminal. Our fundamental ethical concepts are here no guide. We know that we have a thing called Prohibition; we are told, in a general way, that intoxicating beverages are outlawed, that in order to enforce this edict the National Government has taken on new and unusual powers; that where once we had liberty of action we are now forbidden to act; but exactly how far and to what extent we are forbidden the average person does not know. He has no instinctive guide. The law is an innovation, an experiment, if you please; but it is the law; and this fact puts upon the citizen the duty of determining just what it is that Prohibition prohibits. What it does prohibit is a crime (*malum prohibitum*); what it does not prohibit remains an innocent act. What, then, is the law? What is Prohibition?

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WHAT RIGHTS ARE LEFT

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Chapter I

What Prohibition Prohibits

The Eighteenth Amendment

The Eighteenth Amendment was proposed to the legislatures of the several states by a joint resolution of Congress on December 18th, 1917, which read as follows:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

Article ——

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

By January 16th, 1919, it had been ratified by the requisite thirty-six states, and on the 29th the acting Secretary of State, Frank L. Polk, proclaimed its adoption and declared it to be operative as of January 16th, 1920, one year after the date of its ratification. It then became Article XVIII of the Amendments to the Constitution of the United States; and is thus known as the Eighteenth Amendment.

This Amendment prohibited five things: the manufacture, the sale, the transportation, the importation, and the exportation, of intoxicating liquors for beverage purposes. It did not merely grant to Congress the power to prohibit those acts; it prohibited them itself. The only power it granted to Congress was a "concurrent power to enforce this article by appropriate legislation."

The "National Prohibition Act"

The Volstead Act, or, as it is officially called, the "National Prohibition Act," was passed by Con-

gress in October, 1919, was vetoed by President Wilson on October 27th, and was passed over his veto the following day.

This Act is entitled:

An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Although the prohibitory provision of the Eighteenth Amendment is embodied in a short paragraph of forty-four words, the National Prohibition Act is a voluminous law consisting of sixty-seven sections, comprising twenty printed pages in the official document, and containing about twelve thousand words. It is divided into three titles: Title I. To provide for the enforcement of War Prohibition; Title II. Prohibition of Intoxicating Beverages; and Title III. Industrial Alcohol. It is obvious that Title II is the one with which the average citizen is concerned. This is the longest part of the Act and contains thirty-nine sections. Those sections which more nearly touch the everyday life of the individual are as follows:

Section 1 defines the words "intoxicating liquor":

The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and

in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes.

It also defines the word "person' to include "natural persons, associations, copartnerships, and corporations." The prohibitions of the Volstead Act are thus not directed against sovereign states.

Section 3 provides:

No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

An interesting part of this section is that it enlarges the prohibitions contained in the amendment by adding the words "deliver, furnish or possess" and declares the purpose of the Act to be "that the *use* of intoxicating liquors as a beverage may be prevented." It is hardly conceivable that if the Eighteenth Amendment had prohibited the *use* of intoxicating liquors for beverage purposes it would have been ratified by the states. Its words are expressly limited to cover what are generally deemed to be commercial transactions, or what might be

called the traffic in liquor. The Amendment does not prohibit its use; and the Volstead Act itself provides for the lawful use of intoxicating beverages, as will be seen hereafter. This direction as to how the Act shall be construed has influenced some decisions, but has been declared by other Courts to have no practical force, as the legislative branch of the Government has no power to dictate to the judiciary the manner in which it will perform a judicial function. The legislature makes the laws; the Courts construe them.

As to the addition of the words, "deliver, furnish or possess," which are acts not prohibited by the Eighteenth Amendment, this must be read in the light of the constitutional direction that Congress shall have concurrent power "to enforce this article by *appropriate* legislation." While the question as to what is appropriate legislation to enforce the prohibitions contained in the Amendment is, in the final analysis, one to be decided by the Courts when a provision of the Act is called in question, the Supreme Court has been very liberal in its interpretation of this power, almost to the extent of giving to Congress the power to decide for itself what is, and what is not, "appropriate." The decisions in James Everard's Breweries v. Day and in Lambert v. Yellowley go far in that direction.

Obviously the question as to whether or not Congress has power to enact a particular kind of legis-

lation is one to be decided by the Courts, and in deciding that question, the Court must look solely to the Constitution for the source of that power. To permit the legislative department to be the judicial interpreter of its own Acts would result in an elective despotism, which was the very danger that the founders of the Republic sought to guard against in their separation of the legislative, the executive and the judicial departments of the Government.

As was said by Alexander Hamilton in "The Federalist":

> The Courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.

This section (Title II. Section 3) then provides that liquor for *non-beverage purposes* and wine for sacramental purposes may be dealt in; *"but only as herein provided,"* that is, under permits issued by the Commissioner of Internal Revenue. Thus, under the qualified grant of power in the Eighteenth Amendment, *to prohibit "for beverage purposes,"* Congress assumes the power *to limit and regulate* the manufacture, trade, and distribution of all alcoholic compounds and solutions for admittedly *non-beverage purposes.*

Section 4 also deals with liquids which are not

"intoxicating liquors." It will be recalled that in Section 1 the definition of "liquor" provided expressly that the alcoholic liquid must be "fit for beverage purposes" in order to be included in the word "liquor" or the phrase "intoxicating liquor." Section 4 enumerates several varieties of these liquids "which are unfit for beverage purposes," such as denatured alcohol, patent medicines, toilet preparations, flavoring extracts and vinegar, provides restrictions on their manufacture, and then makes it a crime for any person to sell any of those articles "under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for beverage purposes."

Section 6 provides that "nothing in this title shall be held to apply to the manufacture, sale, transportation, importation, possession or distribution of wine for sacramental purposes, or like religious rites." The section further provides that "the head of any conference or diocese, or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine" and such person may be granted a permit to supervise such manufacture.

The Regulations of the Prohibition Unit (Regulations 2, Article XIV) specify in detail the conditions under which sacramental wine may be manufactured, transported and distributed. The quantity of wine which may be withdrawn for sacramental purposes

is fixed in Section 1405 of Article XIV, Regulations 2 of the Prohibition Unit:

Rabbis, priests, ministers, and duly authorized church officials, upon making application for the purchase and withdrawal of wine for sacramental purposes, or for other religious rites, shall submit evidence in the form of a verified statement showing the approximate number of worshippers by whom such wines may be used within the period covered by the application and the approximate quantity necessary for such purposes during such period.

(a) *For use in the home.*—In the case of withdrawals for use in religious rites and ceremonies in the home the maximum allowance for each member of a family living together shall be 1 gallon per adult member per year and not to exceed 5 gallons per year for any one family: Provided, The Administrator may allow a greater quantity in particular instances where it is shown to his satisfaction that such greater quantity is necessary.

Section 7 provides that "no one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor," and that "not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once." This section was amended by the Act of November 23rd, 1921, popularly known as the Willis-Campbell Act, which provided that "only spirituous and vinous liquor may be prescribed for

medicinal purposes." This is sometimes also referred to as the Anti-Beer Amendment. It was attacked in the case of James Everard's Breweries v. Day, 265 U. S. 545, and was upheld by the Supreme Court in a unanimous opinion. The Court in that case held that as Congress was granted the power to enforce the Amendment by appropriate legislation, and as the purpose of the Amendment "is to suppress the entire traffic in intoxicating liquor as a beverage," and as "the opportunity to manufacture, sell and prescribe intoxicating malt liquors for medicinal purposes opens many doors to clandestine traffic in them as beverages under the guise of medicines," that the total prohibition of malt extracts, stout, beer, and porter *for non-beverage purposes* is not an unreasonable exercise of the power vested in Congress by the Eighteenth Amendment. This decision holds, in effect, that the words of limitation "for beverage purposes," do not limit Congress in its legislation and have therefore no practical force, a decision which is not only at variance with the cardinal rule of construction requiring that every word and phrase in the Constitution shall be given effect, but is also contrary to the language of the Court itself in Fairbank v. U. S., 181 U. S. 283 when it said: "If the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon

the power of Congress, that prohibition or *limitation* shall be enforced in its spirit and to its entirety."

Soon after the Everard's Breweries case was decided, the Court by a five to four decision in the case of Lambert v. Yellowley, 272 U. S. 581, declared that the limitation of one pint in ten days on doctors' prescriptions was appropriate legislation. In this case there was a strong dissenting opinion by Mr. Justice Sutherland; but a dissenting opinion, however interesting, is not the law.

Section 17 makes it unlawful "to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises."

Section 18 provides:

> It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor.

This section makes illegal the sale of malt syrup, bottling devices and other paraphernalia if it can be shown that these articles are sold for the purpose of making malt beverages which exceed one-half of one per cent in alcoholic content. There have been

convictions of malt syrup dealers under this section, but the industry is now careful to avoid the giving of specific instructions regarding the manufacture of beer, and points out that its product can be used in baking and in other ways. Bottling devices can freely be sold because they are not used exclusively in connection with the manufacture of intoxicating beverages.

Section 19 makes it unlawful to "give any information of how liquor may be obtained in violation of this Act." This would probably apply to giving your friend the name and telephone number of your favorite bootlegger, but it is doubtful if any jury would convict for this offense.

Section 20 provides:

> Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, . . . shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages.

Section 21 provides that:

> Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept

and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both.

Section 22 provides for the abatement of any such nuisance by injunction, "and upon judgment of the Court ordering such nuisance to be abated, the Court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter." This is the well known "Padlock" section.

Section 23 provides:

That any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law.

This section is probably unconstitutional. It was

so declared by Judge J. W. Woodrough, of Nebraska, in the recent case of the United States v. Cunningham, 37 Fed. (2nd) 349. The section attempts to deprive the accused person of his right to a trial by jury. The jury trial which is guaranteed by the Constitution as one of the bulwarks of liberty was expressly designed as a shield against the arbitrary action of a judge, and this right is clearly taken away if the judge himself, regardless of what a jury might have decided in the case, can lay a perpetual injunction against a man who is accused of crime, and thereafter during the life of the accused can imprison him if the judge happens to think that the man has offended again.

As Judge Woodrough says in his opinion:

> There runs through the Act the idea that the man himself, the human being, is a nuisance, and so beyond the pale of the right to trial by jury.

"This section," said Judge Woodrough, "has stood a dead letter in the Act for ten years because it shocks common sense and common understanding of the Constitution."

Section 25 provides that:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

It further provides:

No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house.

In the Willis-Campbell Act of November 23rd, 1921, it was further provided that any enforcement officer who shall search any private dwelling without a warrant directing such search, or who

shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000 and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

Section 26 provides that when a person is discovered unlawfully transporting intoxicating liquors in any vehicle, the officer shall seize the liquors, shall take possession of the vehicle, and shall arrest the person in charge thereof. The person shall then be prosecuted, and, if convicted, the Court shall also order the liquor destroyed and, "unless good cause to the contrary is shown by the owner," shall order

a sale of the property seized. This section makes provision for the protection of the real owner of the car, boat or vehicle who was innocent of its unlawful use.

Section 29 of the Volstead Act provides the penalties for the violation of the Act, and then contains this important provision:

> The penalties provided in this Act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home.

Section 33 provides:

> The possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. . . . But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein.

The Willis-Campbell Act

After the passage of the Volstead Act there was some doubt as to whether or not it was effective in

all of the territory subject to the jurisdiction of the United States.

Section 3 of the Willis-Campbell Act of November 23rd, 1921, resolved this doubt so far as Hawaii, Virgin Islands and Porto Rico are concerned by providing as follows:

> This act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such Territory and Islands.

This language, however, does not cover the Philippine Islands, which, though subject to the jurisdiction of the United States, have their own legislature and are governed by their own laws, and have not as yet provided for the enforcement of the Eighteenth Amendment.

We therefore have the anomalous situation which is recognized by Section 2103 of the Bureau Regulations reading as follows:

> The Philippine Islands are subject to the eighteenth amendment, but not to the national prohibition act and acts supplemental thereto. Therefore, the importation, exportation, and transshipment of intoxicating liquors in, to, and from the Philippine Islands will be subject to the provisions of the eight-

eenth amendment and to such regulations as may be made by the authorities charged with enforcement thereof in said jurisdiction.

The Philippine Islands, unlike Porto Rico and Hawaii, are not included in any Federal enforcement district. A citizen of the United States residing in the Philippine Islands, therefore, has a certain measure of liberty which is not permitted to him in the United States, that is, if he is a Christian, as there is a prohibitory statute in effect in the Philippine Islands which forbids the selling or giving of intoxicating liquor to *"non-Christian"* tribes.

In 1926, according to the report of the Governor General of the Philippine Islands, 17,016,000 pesos were derived by the local Government from excise taxes on wine, spirits and beer.

The Jones Act

The so-called *Jones Act* of March 2nd, 1929, provides:

That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended, and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by Section 1, Title II of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: Pro-

vided, That it is the intent of Congress that the Court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law (27 USCA § 91, 92).

The effect of the Jones Act is to make all offenses involving the illegal manufacture, sale, transportation, importation, or exportation (the five things which are forbidden by the Eighteenth Amendment), felonies. This is far-reaching. If an offense be a felony an accusation in the Federal Court must be made by a Grand Jury; and under Section 541 of the Criminal Code it is provided that all offenses punishable for a term exceeding one year shall be deemed felonies, and all others misdemeanors. In Brede v. Powers, 263 U. S. 4, the Supreme Court held that the test of a felony does not depend upon the punishment ultimately inflicted, but upon the punishment the Court has power to inflict. A felony is an infamous offense and is within the provisions of the Fifth Amendment to the Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

The Jones Act is unique in American and English jurisprudence in that, by the proviso directing the

Court, in imposing sentence, to discriminate between "casual or slight violations" and "habitual sales of intoxicating liquor, or attempts to commercialize violations of the law," the legislative body directs the manner in which the judiciary should exercise its discretion in imposing a criminal sentence.

Judge Fitzhenry of the District Court for the Southern District of Illinois in the case of U. S. v. Kent, 36 Fed. (2nd) 401, made some interesting and sound comments regarding the Jones Act which were at the time, November, 1929, given wide publicity in the newspapers.

It was the contention of the defendant, in that case, that the Jones Act is unconstitutional in that a defendant is denied a jury trial as to the important finding of whether or not he is an habitual offender, the decision of that question being vested in the Court after the conviction by the jury of the ordinary offense of violating the Volstead Act. This contention was rejected by the Court; but in holding the Jones Act constitutional the judge made the following observations regarding some of the consequences of the Act:

Undoubtedly the passage of the law of March 2, 1929, marks a very great change in the National Prohibition Act. It amends the penalty section of the National Prohibition Act by substituting, so far as it is in conflict with the penalties of the old act, all of its provisions. It is earnestly argued that the

reclassification of crimes should be enough to invalidate the Jones Law.

It is true there is a reclassification of most of the crimes denounced in the National Prohibition Act, excepting such as possession of intoxicating liquor, nuisance, the violation of permits, etc. The crimes of sale, manufacture, transportation, importation, and exportation of intoxicating liquor for use as a beverage are involved. The change of the major portion of the crimes under the National Prohibition Act from misdemeanors to felonies makes the new law operate entirely outside of and beyond the National Prohibition Act.

The effect of the reclassification of many of the crimes under the Prohibition Law is given very little consideration and attention by the current discussions in legal journals and in the press. The effect of the Jones Law is to make an entirely new set of felonies. By reason of this fact it is now a felony for any person who buys a drink of intoxicating liquor not to report the sale to the proper officers of the United States Government; any person who knows that anybody else has transported intoxicating liquor for use as a beverage is now a felon, if he does not report it; any person who knows that anybody else is manufacturing, importing, or exporting liquor for a beverage is a felon, if he does not report it, if the Jones Act is constitutional.

To be sure these particular offenses are not expressly defined in the Jones Act, but by reclassifying certain of the offenses, under the Prohibition Law, another law is brought into operation. I refer to the law known as the Misprison of Felony Act, which has been a part of the law of the country, in sub-

stantially the same form, since 1790. This old act was re-enaced (18 USCA § 251) by Congress as a part of the Criminal Code of March 4, 1909. In this latter law it is provided whoever, having knowledge of the actual commission of the crime of murder or other felony cognizable by the Courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

By the reclassification of offenses from misdemeanors under the National Prohibition Act to felonies under the Jones Act crimes of that character are brought within the operation of the Misprison of Felony Act. So, it will at once be observed that the provisions of the Jones Act are of very great importance and significance to the people of the United States. The constitutionality of the Misprison of Felony Act, as re-enacted in 1909, has never been questioned so far as the court is advised. What might happen if the constitutionality of it were brought before the Supreme Court of the United States, however, is practically certain in the light of the long-continued force and effect of that law and its elemental nature. The reclassification of certain crimes does not make the law void. . . .

The wisdom of a law is one thing, the constitutionality of a law is another. The wisdom of a law is addressed to the legislative discretion, and, when an act of Congress is within the powers granted in the Constitution, it is the duty of the courts to uphold and apply that law. It is the holding of the

court that the Jones Law, in addition to changing all of the offenses mentioned in it from misdemeanors to felonies, simply increases the limits of the discretion vested in the courts, concerning the imposition of fines and sentences.

The sum and substance of the Jones Act and its legal consequence in the light of the Misprison of Felony Act is about as follows:

The seller of liquor has committed a felony.

The buyer, having knowledge of the actual commission of a felony, commits a felony if he does not report the seller.

The friends of the buyer who know that he has committed misprison of felony are now charged with reporting the buyer or else likewise committing misprison of felony; and the friends of these friends, now knowing—but why continue? It is like the house that Jack built. The Jones Act has made felons of us all.

Regulations

Section 1 of Title II of the Volstead Act provides: "The term 'regulation' shall mean any regulation prescribed by the commissioner (of Internal Revenue) with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the Commissioner is authorized to make such regulations." Section 4 of the Willis-Campbell Act authorizes the Commissioner of Internal Revenue

to make "regulations" without the approval of the Secretary of the Treasury.

These "regulations" are voluminous. They are contained in several volumes and occupy hundreds of pages of finely printed matter. They are not the law; but have the force of law unless they are inconsistent with the Act itself. (*In re* Quirk, 1 Fed. [2nd] 484.) They are, in effect, opinions of the Prohibition Bureau as to what constitutes violations of the law. They are not binding on the courts; for if an administrative bureau of the Government can itself issue and promulgate laws we have a direct denial of the fundamental principle of the separation of the legislative and executive departments, which was a principle universally insisted on in the drafting of the Constitution as being a necessary safeguard against bureaucracy and usurpation of power.

"It would seem," said the Court, in State v. Mairs (Mo.) 272 S. W. 992, "that these regulations are merely for the attention and guidance of officials who have in hand the enforcement of the Volstead Act."

These "regulations" being drawn by those who are charged with "strict enforcement" are naturally drastic in their requirements and in their interpretation of the law. The rights of the individual under the law are not touched on; the citizen must find these out for himself.

Statute of Limitations

In State Courts. The time within which the state must commence its prosecution for a crime differs widely in the several states according to their own particular statutory provisions; and if a prosecution for a liquor violation is brought by the state rather than by the United States, the state statute of limitations will govern.

In Federal Courts. The Federal Statute of Limitations as amended by the Act of November 17, 1921, is as follows:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in Section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.
>
> Provided, however, that in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitations shall be six years. R. S. sec. 1044; U. S. Code Annotated Title 18, sec. 582.

Until the amendment of November 17th, 1921, the statute read:

> No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in Section 1046, unless the indictment is found or the

information is instituted, within three years next after such offense shall have been committed.

The proviso enlarging the period to six years in offenses involving fraud, was added in 1921, evidently for the purpose of allowing sufficient time for the investigation of frauds and attempts to defraud in connection with so-called war contracts because of the possible necessity for congressional investigations and because of the ramifications of this large class of business dealings by the Government during the prosecution of the war.

Section 584, referred to in this statute, fixes a five-year period of limitation for any crime arising under the slave trade laws; and hence has no application to liquor violations.

The Volstead Act itself contains no provision limiting the time within which prosecutions thereunder shall be commenced. It would appear, therefore, that for any crime arising under the National Prohibition Act the Government must begin its prosecution within three years after the commission of the offense. The time runs from the commission of the offense and not from the date when it was discovered or when the offender became known.

By Section 583 (USCA Title 18) it is provided that the limitation does not run in favor of an accused person during the time when he is a fugitive from justice.

Chapter II

Enforcement Problems

The National Prohibition Act being, as it is, a revolutionary departure from the contemplated scheme and purpose of the Federal Government, and necessitating the setting up of a national police force of unusual powers, has been the source of an infinite amount of litigation. Violations of this Act far outnumber all other offenses against the Federal Government. It has been estimated that about seventy per cent of all the criminal convictions in the Federal Courts are for violations of the Volstead Act, and even in these cases, were it not for the fact that a large majority of the convictions are upon pleas of guilty after a bargain between the accused and the District Attorney as to the fine which will be imposed, it is safe to say that the machinery of the Federal Courts would become so clogged with cases that they could not function. Evidence of this fact is contained in the report of the Department of Justice for the fiscal year 1929 which was submitted to Congress by Attorney General Mitchell on December 3rd, 1929.

In that part of the report which deals with Prohibition, after reciting the achievement of sending over 21,000 people to jail or prison for terms aggregating over three million days, he states that there were 56,786 criminal prosecutions instituted during the year, and 56,455 cases terminated as follows: convictions 47,100; acquittals 1,477; discontinued, quashed, or dismissed 7,878. Of the 47,100 convictions, 43,183 were obtained by pleas of guilty. "Bargain days," they call them now, in the United States District Courts.

The Bill of Rights

As it is, despite the wholesale dismissals and the numerous pleas of guilty, progress in disposing of the cases that actually come to trial is hampered by the failure of the Government to circumvent certain unalienable rights which the Constitution guarantees to each citizen and of which no act of Congress can deprive him. Some of these rights are set forth and protected forever by the first ten amendments to the Constitution—the most important of which, so far as the enforcement of Prohibition is concerned, are the following:

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

These rights are unalienable. They are not derived from the Constitution, but are natural rights

which antedate the Constitution; they are rights which the Colonists insisted on as Englishmen, rights which they brought to America from the mother country, and rights which they would not permit England or any government on earth to deprive them of. To make this matter clear for all future generations they enumerated certain of them in the Constitution as the first eight amendments, and then added as the ninth amendment:

Article IX

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

And then to put it forever beyond any dispute that the Federal Government should be a government only of limited and delegated powers, this final provision was added:

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In referring to this Bill of Rights, the Court said in Ex parte Milligan, 4 Wallace 2, pp. 119-120:

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of

man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

It takes very little imagination to picture the demoralization which would result to the machinery of the Federal Courts if each citizen accused of violating the Prohibition Act should demand—which he can—a strict observance by the Government of these constitutional guarantees. No wonder there is compromise. As Professor McBain says in his scholarly treatise, "Prohibition Legal and Illegal' (Macmillan, 1928):

The prosecutors could not possibly try by jury all the numerous cases that arise. The courts would be inundated. Cases would pile up endlessly. There

would be no possibility of ever catching up with the business. The practice of prosecutors, therefore, is to discard all cases involving the least doubt about the acceptability of evidence, of which there are a great many.

Taking, then, only those in which the evidence is relatively unimpeachable, the prosecutor seeks wherever possible to obtain pleas of guilty. And he obtains them. Rarely does an accused person plead guilty unless he has something to gain by the plea. The accused violator of the National Prohibition Act has something to gain. He dickers and fences with the prosecuting attorney. He will plead guilty provided the punishment is only a fine of such and such amount. The attorney agrees. In such circumstances the accused does not care a rap about the ancient institution of trial by jury. He escapes a jail sentence, he avoids the delay and publicity of a jury trial. If he is a regular bootlegger he is usually quickly back on his job.

A Man's Home Is His Castle

But aside from these constitutional rights which no Congress can take away and which are a serious handicap to the strict enforcement of the Prohibition Act, the Act itself, despite its numerous "Thou Shalt Not's," permits certain things which, while not in any sense violative of the Eighteenth Amendment—if, as the Supreme Court has said, the Amendment is aimed solely against the *traffic in liquor*—nevertheless are contrary to the alleged purpose of the Volstead Act as expressed in Section 3 "that the use

of intoxicating liquors as a beverage may be prevented."

Section 29 of the Act, by a rather curious phraseology, while not specifically saying that the manufacture of wine in the home is permitted, provides that the penalties of the Act "shall not apply to a person for manufacturing non-intoxicating cider and fruit juices exclusively for use in his home." This clause was added to the Bill in the Senate, as the Record shows, for the benefit of the farmers who make cider and the many citizens of Italian and Greek birth who are accustomed to make wine for their own consumption. The language was evidently framed to placate these people and at the same time not to offend the ardent drys. Section 1 of the Act defines an intoxicating liquor as *any liquid, by whatever name called, containing one-half of one per centum or more of alcohol, which is fit for beverage purposes.* If cider and wine made in the home contain less than one-half of one per cent of alcohol they are non-intoxicating, and the statute has nothing whatever to do with them; if they contain one-half of one per cent or more of alcohol they are intoxicating. The word "intoxicating" cannot have two different definitions in the same statute. If it were not, then, the intention to permit intoxicating wine and cider to be made in the home, the provision in Section 29 is meaningless; if it were intended to permit this manufacture, and the Record shows that

such was the intention, then the only logical explanation of the use of the word "non-intoxicating" in Section 29 is that the cider or wine must be non-intoxicating when first manufactured, and that the subsequent natural fermentation does not make a crime of the innocent act of pressing the juice from the fruit so long as the process takes place in the home and the product is not for sale. The cases which have arisen under this section seem to hold that the Government must prove the product to be *intoxicating in fact;* but as such a construction is contrary to the definition explicitly set forth in the Act, it is obviously in error. The Supreme Court has not yet passed on the question.

The exemption with regard to home-made beverages applies only to "cider and fruit juices." Dandelion wine and wines made from dried fruits are considered by the Prohibition Bureau to be without the pale. In order that there may be no mistake on this point Section 905a of the Regulations of the Prohibition Unit was promulgated:

> Dried fruits, dandelions, rhubarb, etc., may not lawfully be used in the production of "non-intoxicating cider and fruit juices" mentioned in this article.

Subdivision (b) of this regulation says that it is a crime to add sugar to the apple juice for the purpose of increasing the alcoholic content of the cider.

Nor is there any exemption from the penalties of

the Act for the manufacture in the home for home use of other kinds of intoxicating beverages such as beer, or ale, and theoretically one is punishable for such an offense. Practically, however, a citizen in his own home may do about as he pleases so long as he does not break the peace; and if a man chooses to make beer or even distill whiskey or brandy for his home consumption and not for sale he is protected from interference by Section 25 which provides that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful *sale* of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

This is a definite and specific prohibition against the Government itself in recognition of the ancient doctrine that a man's home is his castle. It recalls the eloquent words of William Pitt:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter,—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.

Federal and State Laws in Conflict

One of the arguments advanced by those who advocated National Prohibition was that it would

make the law uniform throughout the United States. If we had but one Federal law on the subject this might result; but unfortunately for the citizen who endeavors to learn what is or is not the law regarding intoxicating beverages, he must not only familiarize himself with the Federal law as embodied in the Volstead Act, the Willis-Campbell Act, and the Jones Act; but if he resides in a state which has its own enforcement laws, he must learn them also, and if he travels—and a great many people save their thirsts for such occasions—he should familiarize himself with the enforcement laws of the several states in which he expects to stop. In New York, Maryland, Montana, Nevada and Wisconsin, which have no enforcement laws, he would be safe in relying upon his rights under the Federal law, and would also be assured that he would not under any circumstances be punished twice for the same offense, a result which might happen if he were unfortunate enough to be apprehended in a state which has its own act of enforcement; the Supreme Court having decided in U. S. v. Lanza, 260 U. S. 377, that "conviction and punishment in a state court under a state law for making, transporting, and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the Federal law for the same acts."

Even with the Volstead Act, different Circuit Courts have given different interpretations of some

of its provisions, so that the Federal law itself cannot be said to be quite uniform throughout the United States; but this diversity of interpretation among the different circuits is gradually being clarified by decisions of the Supreme Court.

In any discussion of the law regarding intoxicating beverages, it is important to keep in mind that prior to the Eighteenth Amendment each state, by virtue of its sovereignty and in the reasonable exercise of its police powers, might make any laws which its legislature deemed proper to regulate, control or prohibit the manufacture, sale and transportation of intoxicating liquors within the state; but that upon the adoption of the Eighteenth Amendment the powers to limit and regulate disappeared, and only the power to prohibit was left. I say the powers to limit and regulate "disappeared' because when these powers were taken away from the states they were not transferred to the Federal Government, but vanished completely.

An apt illustration of this unusual effect is seen in the case of the public saloon—now the speakeasy. Formerly the state could regulate and control these public drinking places; but under the Eighteenth Amendment this is impossible; the law does not recognize their existence. Both the Federal Government and the state are now forbidden to adopt any measures whatever to control their operations. They can only be forbidden. As a result, the large metro-

politan cities have now more speakeasies than there were licensed saloons before Prohibition. In New York City, National Prohibition has hatched over twenty thousand speakeasies. It has substituted for an institution which the people of New York had learned, from more than a century of experience, to control and supervise, an unregulated, crime-breeding dive, and then, in effect, says to the people of New York: "That is your local police problem now. It is up to you to work it out."

In brief the Amendment took away from the states their power to deal with the liquor problem in any other manner than in accordance with the prohibitions of the Amendment; and when Congress enacted the Volstead Act, it deprived the states of their power to legislate effectively on the subject unless their legislation should be at least as drastic as the legislation by Congress. Thus, if a state should define an intoxicating beverage to be one that has less than one-half of one per cent of alcohol, the state law would be valid (Vigliotti v. Pennsylvania, 258 U. S. 403); but if the state should define an intoxicating beverage to be one that has more than one-half of one per cent of alcohol, say two and a half per cent, the law would be in conflict with the Volstead Act and would afford no protection against Federal prosecution. Whether or not such a law would be declared void by the Courts is doubtful; its validity would depend upon whether or not

it is *appropriate legislation* to enforce the Amendment. Any reasonable definition of intoxicating liquor by a state in the exercise of its own police power would probably be declared valid so far as state enforcement officers are concerned; but, of course, would not be binding on Federal enforcement officers. A person may under such circumstances be a law-abiding citizen of his state under the state law, but a felon under the United States law. Thus, each state may pass such laws as it sees fit to carry out the intent and purpose of the Amendment. It may go beyond the Volstead Act as rigorously as it pleases to endeavor to enforce strict Prohibition, but it can do nothing to lessen the rigors or the penalties prescribed by Congress. Some states have gone beyond Congress in the drastic enactment of their laws, so that their citizens are put in the position of being law-abiding as citizens of the United States, but criminals as citizens of their own states. This anomalous situation has been obviated in some states by the enactment of a state enforcement act similar in every respect to the provisions of the Volstead Act. In other states, it has been obviated by the repeal of their prohibitory legislation and the leaving of the burden of enforcement of National Prohibition to the National Government. The courts have not yet been able to give any satisfactory interpretation of the word "concurrent" as used in the Eighteenth Amendment.

In United States v. Lanza, referred to above, the Supreme Court very clearly pointed out one of the unfortunate results of this dual sovereignty. The defendant Lanza was prosecuted under the National Prohibition Act for an offense for which he had already been convicted and punished in the State Court of Washington. The Supreme Court held that this did not violate the provision of the Fifth Amendment which reads: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In its opinion, the Court said:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each Government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. The Fifth Amendment, like all the other guarantees in the first eight amendments, applies only to the proceedings by the Federal Government, Barron v. Baltimore, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense

against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a Court of Washington of the offense against the State is not a conviction of the different offense against the United States, and so is not double jeopardy.

With the wisdom of this decision we are not here concerned; but we might remark in passing that although the great Chief Justice Marshall did decide in Barron v. Baltimore (a civil action) that the provision in the Fifth Amendment, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the Federal Government and is not applicable to legislation by the states; in the Lanza case (a criminal prosecution), the Court seemed to lose sight of the fact that double punishment for the same offense is, and always has been, utterly opposed to every conception of justice, whether under the Mosaic, the Roman, the Common law, or any other system. It is a fundamental concept of Liberty. Again, if Lanza had been convicted first by the United States and then by the State of Washington the reasoning of the Chief Justice in Barron v. Baltimore might possibly have applied and the case might properly have been dismissed (as was done in Barron v. Bal-

timore) *for want of jurisdiction;* but in the Lanza case the Court did have jurisdiction, and the question was fairly before it whether under a dual system of government or any other system a man shall be deprived of his liberty twice for the same act. Lanza did not claim that his conviction by the State Court was double jeopardy. His second conviction was by the Federal Court, and it was to a Federal Court that he appealed. The question raised by him was the exact opposite of that presented in Barron v. Baltimore.

This case is but one illustration of the startling conclusions to which the courts have arrived in their endeavor to apply constitutional principles to the complicated and novel innovation of the Eighteenth Amendment and its legislative interpretation by Congress in the Volstead Act.

The danger of this double jeopardy to the citizens of his own state was one of the grounds given by Governor Smith in June, 1923, when he signed the Act repealing the New York State Prohibition Enforcement Act.

A general impression seems to prevail which is concurred in by many of the District Courts and by some of the text writers on the subject of Prohibition that the effect of the Eighteenth Amendment was to confer on Congress the same powers to deal with the liquor question that the several states themselves had within their territorial limits

before the adoption of the Amendment; and some of the decisions of the Supreme Court of the United States border on that interpretation. The direct question itself has not as yet been decided by the highest tribunal. The proper constitutional view, however, is that Congress has only such powers as are delegated to it by the Amendment, whereas, the states have all powers except those which they have expressly or by necessary implication delegated to Congress. Congress, then, is limited to legislation which is appropriate to the carrying out of the prohibitions of the amendment, whereas, the states, under their general police powers, may pass any laws which are proper and reasonable for the protection of the health and general welfare of the state. This distinction seems to have been lost sight of in the case of Lambert v. Yellowley, in which Dr. Lambert sought to enjoin enforcement of the provisions of the Volstead Act restricting the amount of intoxicants which he might prescribe to his patients. The Supreme Court, in deciding against Dr. Lambert's contention, cited the numerous provisions in state laws regulating doctors' prescriptions as authority for the right of Congress to enact similar laws; but obviously there is no analogy. A state can do anything which it is not forbidden to do. The Federal Government can do only what the states have granted it power to do. New York, for example, can regulate the practice of medicine in New York.

Congress has no such power. If New York should now enact a law relating to the prescribing of alcoholic stimulants by its licensed physicians and the question should be presented to the Supreme Court as to the legality of the state law on that subject, it would be difficult indeed for the Court to sustain a reasoned decision to the effect that the state law was void. In the Lambert case, the Court had no such question presented. Perhaps some state will yet see fit thus to test its sovereignty over this local subject.

Chapter III

The Rights that Are Left

After reading the thirty-nine sections of Title II of the Volstead Act, the average citizen might well ask: What is there left that a sober man can do who wishes to dine as his forefathers dined, and who wishes to regulate his own family life without governmental dictation? In the following paragraphs there will be set forth as briefly as possible the things which are not forbidden by the Volstead Act, together with some of the decisions of the Courts in upholding the rights of the individual against unconstitutional encroachments by the Government.

Possession of Liquor in the Home

There seems to be a widespread impression that it is a violation of the law to serve intoxicating liquors to one's guests at dinners and other functions in the home. People who do this have in some localities been called scoff-laws, and have been censured as though they were doing an unlawful or naughty act. In other sections they are considered fashion-

able and smart for the same reason. But there is neither ground for just criticism nor the glamour of forbidden fruit in the home consumption of liquor.

The Volstead Act not only does not prohibit drinking in the home, but expressly and specifically permits it and declares it to be lawful.

The following excerpts from the law should settle that question:

Section 33. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein.

Section 25. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house.

Section 25 (again). No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose.

A law such as the Volstead Act, strictly prohibitory in its nature, could hardly be more specific in its intention to exempt from any suggestion of unlawfulness the home possession and consumption of intoxicating liquors, and the Supreme Court in Street

v. Lincoln Safe Deposit Co., 254 U. S. 88, expressly so declared. In that case the Court decided that even the keeping of liquors in a warehouse company's vaults for subsequent transportation to and consumption in the home is lawful, and that it was not the intention of Congress to declare such use unlawful.

But although the Volstead Act expressly permits the possession of liquor in the home, there are some states which make such possession a crime; and what is said above cannot be considered a safe rule for citizens of such states.

A rather pathetic illustration of the non-uniformity of the law throughout the United States on this subject is found in the case of Samuels v. McCurdy, 267 U. S. 188. Mr. Samuels was a man of temperate habits, an American citizen and a resident of Georgia. He had been born and educated abroad and he and his family had long been accustomed to the temperate use of alcoholic beverages.

Long before the Eighteenth Amendment and even before the enactment of the Georgia Act of 1917, he had purchased a supply of whisky, wines, beer, cordials and liquors for the exclusive use in his home and had them stored there. There had never been any suggestion that he had sold any liquor in any way. He was a strictly law-abiding citizen. But despite this fact his house was entered under a state search warrant by a state officer, and his liquors

seized. The Georgia law makes it a crime "to possess in this State any of said enumerated liquors or beverages whether intended for personal use or otherwise."

Mr. Samuels filed his petition for the recovery of his liquors and for an injunction to prevent their destruction. On a writ of error from the Supreme Court of Georgia, the United States Supreme Court, speaking through Chief Justice Taft, sustained the right of the state to confiscate these liquors under the Georgia law. If Mr. Samuels had lived in New York, where he would have been subject only to the provisions of the Volstead Act, he would have been protected in this innocent enjoyment of his legally acquired beverages.

In his decision, the Chief Justice uses the following language:

> The ultimate legislative object of prohibition is to prevent the drinking of intoxicating liquor by anyone because of the demoralizing effect of drunkenness upon society.

In a dissenting opinion, Mr. Justice Butler takes issue with this statement of the Chief Justice and says:

> The enactment does not directly forbid the drinking of intoxicating liquors. The State Supreme Court has not construed it to prevent such private use of intoxicants. It is aimed at the liquor traffic. Attention has not been called to any legislation which

attempts directly to forbid the mere drinking or other private use of such liquors. The power of the State to enact and enforce such legislation has not been established. Any suggestion that the destruction of such private supply lawfully acquired and held for the use of the owner in his own home is necessary for, or has any relation to, the suppression of sales, or to the regulation of the liqour traffic, or to the protection of the public from injury, would be fanciful and without foundation.

A question which suggests itself immediately to one who reads these words of the Chief Justice is that if the ultimate legislative object of Prohibition is to prevent the drinking of intoxicating liquor, why does the law go to such extreme lengths to prohibit everything except the drinking of intoxicating liquor; and why did both the Eighteenth Amendment and the Volstead Act expressly and deliberately refrain from prohibiting the act of drinking intoxicating liquor?

The reason perhaps is clear. Any such law enacted by Congress or even by the legislature of a state, would, on its face, be so oppressive and arbitrary that it would probably be declared void by any Court which applied thereto the most elementary principles of constitutional liberty.

Home Manufacturing

It has been seen before that Section 29 of the National Prohibition Act makes an exception to the

general scheme and purpose of the Act and permits without penalty the manufacture of home-made wine and cider. Nothing is said in that section which would indicate that it is the purpose of the law to permit the home manufacture of beer and distilled spirits. This, however, as has been shown before, is practically permitted by Section 25 of the Act which provides that no search warrant shall issue to search any private dwelling occupied as such unless it be used for the unlawful sale of intoxicating liquor.

It has been repeatedly held that even the home distillation of whisky is beyond the reach of a search warrant unless the home distiller has been selling his product; and that without a search warrant an entry and seizure is illegal, and no conviction can result therefrom.

In Staker v. U. S., 5 Fed. (2nd) 312, Prohibition officers passing along the public street detected the odor of cooking mash coming from the basement of Staker's home. They went before the Magistrate and made affidavit that they had smelled the fumes from the still making intoxicating liquors and had reasonable grounds to believe that intoxicating liquors were being manufactured, sold, disposed of or illegally possessed in the house described. A search warrant was issued. The still was found, but Staker was released because the Court held that the search warrant was invalid as there were no facts alleged in the affidavits that would tend to show that

the dwelling had ever been used for the unlawfu *sale* of liquor or that any part of it was used fo some business purpose.

It seems clear from the decisions that even thoug the officers know from their sense of smell or eve from their sense of sight that a still is being operate in your own home they have no right to enter therei unless they have evidence that the house or apart ment has been used for business purposes or for th unlawful sale of the product. This subject will b discussed at more length under the heading o "Searches and Seizures."

Devices for Home Brew

On May 5th, 1930, the Supreme Court of th United States handed down a decision in the cas entitled "Ike Danovitz, surviving partner of Feitle Bottle Company, v. The United States," which wa given wide publicity in the press under headline such as "Makers of Containers for Liquor Brea the Dry Law, Says the Supreme Court." Many o the articles were to the effect that this case opene up an entirely new class of prosecutions under th Volstead Act and would be used by the Prohibitio Bureau in an endeavor to close all places which pub licly offered for sale malt products and devices fo making home brew. The decision was hailed wit satisfaction by the Prohibition Bureau, and Mr. Sey mour Lowman, Assistant Secretary of the Treasury

in charge of Prohibition enforcement, was quoted in the *New York Times* as saying:

The Prohibition Bureau has endeavored for some time to prosecute persons who sold beer-making devices and malt products to which yeast may be added to create intoxicants. So far such prosecutions have been unsuccessful. While the treasury felt that the selling of these devices was unlawful, the courts failed to take this view. They also held as to malts that they were non-intoxicating and therefore could be sold, unless it was shown that the seller was conspiring to violate the law. Establishments right here in Washington sell kegs, bottles, cappers, and every other device necessary for the manufacture of beer. The beer maker needs but to follow the directions.

The *New York Herald* reported Mr. Lowman as saying:

That the test case was brought at the instance of his office and that it would have a salutary effect in tightening up prohibition enforcement. It would stop, he declared, the open sale of paraphernalia and ingredients which plainly were intended to invite violation of the law.

On the face of the decision, there is some ground for the interpretation which was generally put upon it that it would permit the Government to raid and close the thousands of small shops that deal in materials and apparatus for home brew. Such, however, is not the case.

The facts in Danovitz v. The United States were as follows: The Feitler Bottle Company kept what might be called a bootleggers' outfitting establishment. Their stock included liquor in several cans and jugs, empty bottles, demijohns, marked corks, sealing wire, wrappers for whisky bottles, labeling machines, assorted fake labels, whisky chips (*i.e.*, shavings from the interior of whiskey barrels which had absorbed the whiskey and which were used in the manufacture of bootleg liquor), forged strip stamps bearing the names of different distillers, some American and some Canadian, and all of the paraphernalia which was necessary for the manufacture of bootleg liquor to be sold commercially, dressed up as popular pre-war brands such as "William Penn," "Golden Wedding," "Gordon Gin," etc.

As the Court below said, 34 Fed. (2d), page 32

This was not a heterogeneous stock in trade open to casual purchasers desiring bottles, corks, barrels, syrup and other wares for personal or commercial purposes. The stock was so selected, kept and arranged as to make separate and distinct liquor set-ups. For instance, if a person should want to outfit an illicit gin plant he could buy from the respondents everything necessary to that business except, perhaps, the basic alcohol in large volume.'

(9) It is plain that bottles, corks, sealing wire, or great quantities of these articles, do not, standing alone, constitute property designed to be used in the manufacture of liquor. Ordinarily they are lawful

articles of commerce not affected by the National Prohibition Act. But when, not standing alone, they are assembled and put on sale with clearly forbidden property they take on a new character and themselves become contraband because intimately associated with unlawful manufacture and inseparably connected with the sale of the unlawfully manufactured product.

The Court then pointed out that in the present case, the seized paraphernalia was sold with a clear intention, both on the part of the seller and the buyer that it should be used in the manufacture and sale of intoxicating liquors as a commercial enterprise, for certainly no one would desire the fake labels and counterfeit stamps, wrappers and other devices for simulating legitimate manufacture, unless the product was designed for sale in the bootleg market.

As the Court further said:

Mere possession of property designed for the manufacture of liquor is not forbidden by section 25, title 2, of the Act; the inhibition goes to property so designed when the liquor manufactured or to be manufactured by it is "intended for use in violating" the Act, sale of the liquor being the most common "use."

The Danovitz decision has no application to the department store or other legitimate store which sells bottles, corks and other articles, including yeast and malt syrup, which may be used in the manufac-

ture of home brew. Such articles may be used for many purposes, and the fact that they may be used for illegal purposes does not render them liable to forfeiture under Section 25, or their possessor liable under Section 18. Both of these sections contain the qualification that the utensil compound or property must be "intended for use in the unlawful manufacture of intoxicating liquor" or "intended for use in violating this title." It is for the Government to prove this unlawful intent, and there is no presumption created by the statute to aid the Government in that part of its case. In the Danovitz case the intent was clearly proved; everything about the place showed an illegal purpose—even manufactured liquor was found on the premises. The line of demarcation would be impossible to draw if the Prohibition Bureau sought to confiscate all property that *may* be used in the manufacture of liquor.

Liquor in Embassies

Due to the well-established principle of international law known as "Exterritoriality," foreign warships when in our ports, and the residences of foreign diplomatic agents, are presumed to be a part of the territory of the state represented, and are not subject to the laws of this country. This principle has been recognized by the Government and is embodied in a ruling of the State Department (see letter of February 10th, 1923, from the Secretary of

State to the Chairman of the Committee on the Judiciary of the House of Representatives, *Congressional Record,* February 16th, 1926) that no seizure shall be made of liquor in possession of any person in the following classes:

(a) Diplomatic officers duly accredited by a foreign government to the Government of the United States.

(b) Diplomatic officers of a foreign government duly accredited to another foreign government and temporarily within the United States or its possessions.

(c) Persons attached to or employed by any diplomatic mission, whose names have been registered with the Department of State in accordance with the provision of section 4065, Revised Statutes.

Section 2204 of the Regulations of the Prohibition Unit provides that the Bureau of Customs and the Prohibition Unit will from time to time report to the Department of State regarding the amount of liquor imported and transported by foreign embassies. It is the practice of the Prohibition Unit to furnish an official convoy for liquor destined to foreign embassies.

Rights of Hotel Keepers

What is the liability of a hotel keeper for serving his guests with ginger ale, charged water, ice and glasses?

If it were not for the threats which have been made in some localities by zealous Prohibition enforcement officers the answer to such a question would seem so obvious as to make its asking absurd.

Of course there is nothing in the law to make such an act unlawful. Hotel owners who have been threatened with padlock proceedings unless they exact a pledge of total abstinence from their guests have, however, in consequence of the large investment involved, shown a natural reluctance to test the case on their own account.

The law regarding the padlocking of premises is clearly set forth in Sections 21 and 22 of the Volstead Act. Section 21 declares that "any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is *manufactured, sold, kept, or bartered* in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

Section 22 defines the procedure to enjoin such a nuisance and provides that "upon judgment of the Court ordering such nuisance to be abated, the Court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter."

There have been numerous decisions construing these sections of the Act, but as each case is decided on its particular facts, no settled rule can be laid

down. The proceeding is brought and tried as an action in equity, and the final judgment lies within the discretion of the Court, acting without a jury.

An examination of the cases, however, seems to make it clear that the Courts have not ordered the closing of any place unless it has been used as a rendezvous for the drinking of liquor. Night clubs and other places of that character which obviously could not exist except for the use of liquor by its customers have been padlocked even though there was no evidence before the Court that the owner of the night club had anything to do with the sale of the liquor, or in fact, that any liquor was sold on the premises. The mere fact that the place was maintained primarily as a rendezvous for people who transported their own liquor in bottles and flasks and proceeded to drink it in common with others of like inclinations has been held sufficient ground for closing the place as a common nuisance.

But there can be no suggestion of a hotel maintaining a nuisance where it serves its guests with bottled water and cracked ice and soft drinks in his room, or even in a public dining room unless the management has allowed it to acquire a reputation as a general public drinking place. The word "kept" used in Section 21 has been judicially construed by the Supreme Court, in Street v. Lincoln Safe Deposit Co., 254 U. S. 88. The Court said:

The word "kept" in this Section is the only one of possible application to the case at bar, and the words with which it is immediately associated are such that, as here used, it plainly means kept for sale or barter, or other commercial purpose. Its inapplicability to this case is apparent. Noscitur a sociis.

In this decision the Court construes the word "kept" to have the significance which one gives it when he asks a storekeeper, "Do you keep brandy?" meaning, does he keep it for sale. The phrase *"noscitur a sociis"* means that a word is known by its associates, and when the word "kept" is associated with "sold" and "bartered," the construction given it by the Court would seem to be correct.

In a case decided in April, 1929, in the District Court for the Western District of Washington, United States v. Butler Hotel Co., 32 Fed. Reporter (2nd) 324, it seems that there was a dining room in the Butler Hotel of Seattle known as the "Rose Room," which operated as a regular dining room until nine o'clock at night, at which time the orchestra came in and there was a cover charge of $1.25 for Saturday nights, $1.00 for Thursday nights and 75 cents for other nights. It was a popular place where students, young people and some older ones gathered to while away the evening in drinking and dancing. When the raid was made, sixty-five bottles were taken from the tops and from under the tables and elsewhere about the room. The agents pur-

chased one bottle from the bell boy of the hotel. Two bottles were taken out of a cupboard, two from the cashier's desk and one from a waiter's coat in the closet. The waiters were opening bottles for guests and placing them on the tables. In other words, drinking seemed the principal entertainment, and practically no food was served in the room after nine o'clock.

Under this state of facts, the Court entered an order padlocking the Rose Room, but permitting the defendants, upon the filing of a bond in the sum of $1,000, conditioned that it would be closed from nine o'clock P.M. to nine o'clock A.M., to operate the room during more innocent hours. The other activities of the hotel were not interfered with.

The evidence in that case indicates that the Rose Room was, after nine o'clock, practically doing the business of a night club wherein the guests could obtain liquor by purchase from waiters or bell boys. Such places are obviously nuisances under the law and have been so declared by the Courts; but there is very little danger of any Court of Equity declaring that a hotel is guilty of maintaining a nuisance so long as it conducts its business in an orderly fashion.

Intoxication

Intoxication is not an offense under the Prohibition Act or under any other Federal law (Clayton v. U. S., 284 Fed. 537).

In a Kentucky case (Rush v. Commonwealth, 206 Ky. 151), by one of those peculiar subterfuges which enforcement officers resort to, the defendant was prosecuted for carrying whisky in his stomach on the ground that such carrying of whisky was transportation; but the Court rejected that theory and held that liquor when drunk ceases to be intoxicating liquor and becomes a part of the person and is hence not a subject of transportation. It is equally clear that as the Volstead Act expressly requires that intoxicating liquor shall be *fit for beverage purposes* there can be no question as to the innocent quality of the liquor after it has been consumed. Nor is the drinking of liquor made an offense by any Federal law. The gratuitous statement in the Volstead Act that "all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented" is without any serious significance. It not only contradicts other provisions of the Act itself, but is not covered by any grant of power to Congress. The Courts must construe the Constitution and the statute as written and will properly ignore a contradictory direction of the legislature as to its interpretation.

Purchasing Liquor

Despite the fact that neither the Eighteenth Amendment nor Section 3 of the National Prohi-

bition Act prohibits the purchase of intoxicating liquors for beverage purposes, the Prohibition Bureau has sought in two test cases to make the purchaser guilty. Both of these cases went to the Supreme Court of the United States and were decided on the same day, May 26th, 1930.

The first case was United States v. Norris which went to the Supreme Court on a writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit. The facts were as follows: Norris, a banker, resided in New York City. Kerper, a bootlegger, resided and operated in Philadelphia. It was Norris's custom to telephone his orders to Kerper who packed the liquor and sent it by express to Norris under the guise of paint, ink, olive oil, and other harmless products. Norris used the liquor only in his home in the innocent entertainment of his guests. The District Court held, 29 Fed. (2nd) 744, that the mere purchase of liquor is not an offense under the National Prohibition Act, and that the purchaser cannot be convicted for aiding and abetting the crime of sale; and that if Mr. Norris had purchased from his local bootlegger he would have been innocent of any crime; but where, as in this case, there was a conspiracy between Norris and Kerper to effect the "transportation" of the liquor, another offense had been committed separate and distinct from either purchase or sale; and it was for this other offense that Norris was convicted.

On appeal, however, the Circuit Court held, 34 Fed. (2nd) 839, that the purchaser cannot be punished even if transportation were involved. Not only did this decision reverse the ruling of Judge Kirkpatrick in the District Court; but it also criticized the Prohibition Bureau for its overzeal in attempting control over the purchaser, which, it declares, was not intended in any of the prohibition statutes. The opinion says:

> While the seller of liquor, who delivers it to the purchaser, is liable under the law both for the sale and transportation, the purchaser to whom the goods are delivered is chargeable with neither the purchase nor the transportation. It thus appears that while the legislative department of the government has deliberately and intentionally made the purchaser of liquor guiltless of any offense under the Prohibition Law, the executive department of the government seeks here, by indirection, to make of the same fact, namely, the purchase, a crime subjecting the purchaser to a maximum fine of $10,000 and imprisonment for a term of two years. Such a situation is scarcely conceivable, and yet that is the position of the government.

Third. Concerning the crime of conspiracy, it is a well-established principle that, where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime cannot take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. This is the

language of Judge Thompson in the case of United States v. Katz (D. C.) 5 F. (2d) 527.

Fourth. In the case of seller and buyer, transportation by the seller is a mere incident in the sale, and necessary to its completion by delivery to the purchaser. It is an inherent feature, an essential element, of the sale, which the seller had, on his part, to perform. The sale necessarily involves an agreement, a concert of action, between buyer and seller to effect the purchase, and it could not, with any reason, be said that a conspiracy would lie to do something which was an essential element of the sale.

Finally, under the authorities it cannot be held that the purchaser, as such, is guilty of aiding and abetting either the sale or the delivery, and the degree of co-operation necessary to constitute one a conspirator must be such as to amount to more than the mere aiding and abetting in the commission of the offense.

From the foregoing considerations we are of opinion that a sale of liquor, involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport. The judgment is therefore reversed.

When the case came before the Supreme Court (U. S. v. Norris, No. 555), the Court held that as Norris had pleaded *nolo contendere* in the District Court, he had in effect pleaded guilty and there was no issue either of law or fact for an Appellate Court to pass upon.

The Court said:

After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. Regarded as evidence upon the question of guilt or innocence, the stipulation came too late, for the plea of nolo contendere, upon that question and for that case, was as conclusive as a plea of guilty would have been.

The Court was no longer concerned with the question of guilt, but only with the character and extent of the punishment. People ex rel. Hubert v. Kaiser, 206 N. Y. 46, 51-52. The remedy of the accused, if he thought he had not violated the law, was to withdraw, by leave of Court, the plea of nolo contendere, enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way.

As to whether the stipulated facts, if open to consideration, make out a case of criminal conspiracy, we express no opinion.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

What would have been the decision of the Court if the issue had been properly presented on the appeal remains undecided.

It will be recalled that in Section 3 of the Volstead Act, Congress refrained from using the word "purchase" as one of the things prohibited; and the *Congressional Record* shows that this was done intentionally. The word was also intentionally omitted

from the Eighteenth Amendment. When the resolution proposing the Amendment was before Congress Senator Hardwick of Georgia proposed that the Amendment be made to prohibit the purchase and use as well as the manufacture, sale and transportation of intoxicating beverages. In answer to that suggestion, Senator Sheppard delivered an impassioned speech in which he declared that the prohibition of purchase and use was not at all necessary. "The provision as already framed," said he, "will destroy completely the traffic of intoxicating liquors. Use will cease and purchase will cease, and therefore it is unnecessary to have specific provisions as to purchase and use embodied in the Amendment."

In view of the legislative history of the Amendment and the Act, it is extremely doubtful whether the Supreme Court would permit the Prohibition Bureau to accomplish by indirection what it is not empowered to do under the statute, especially as the Supreme Court has heretofore expressed its disapproval of the Government's use of the conspiracy charge to convict citizens for alleged violations where a crime cannot be otherwise proved against them under the law.

The Katz case (supra) was appealed to the Supreme Court, and the soundness of Judge Thompson's ruling was affirmed, U. S. v. Katz, 271 U. S. 354. In that case, Justice Stone, speaking for the Court, said:

The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity (citing a number of cases).

The other case, United States v. Farrar, was an attempt by the Government to hold the purchaser guilty under Section 6 of the Volstead Act. This section is devoted to the subject of the authorized manufacture, sale and transportation of intoxicating liquor for *non-beverage* purposes and provides that "no one shall . . . purchase . . . any liquor without first obtaining a permit from the Commissioner so to do."

This case arose in the Federal District Court for Massachusetts. A motion was made to quash the indictment on the ground that the ordinary purchase of intoxicating liquor does not come within the purview of the National Prohibition Act. The Court sustained the motion (38 Fed. 2nd, 515) and the Government appealed direct to the Supreme Court of the United States where the judgment of the District Court was affirmed.

In its opinion, the Court said:

It is fair to assume that Congress when it came

to pass the Prohibition Act deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability.

It is interesting to note that Counsel for the Government in his brief urged the Court to hold Farrar guilty "in the light of the ultimate aim and purpose of the Act which is to prevent the use of intoxicating liquor as a beverage," but the Court in its opinion did not consider this point of sufficient merit to warrant comment.

Congress probably has the power, in view of the sweeping decision in Lambert v. Yellowley, to amend the Volstead Act so as to make the purchaser guilty. Senator Sheppard of Texas introduced a bill to this effect a few days after the decision in the Norris case was handed down.

In support of his proposed amendment the Senator is quoted as saying:

The purpose of the Eighteenth Amendment is to stop the use of beverage liquor in the United States. No one can escape the proposition that the buyer of intoxicating liquor is equally guilty with the seller if the liquor traffic is to be considered a crime. The moment they (the buyers) are branded as law breakers half or more than half of them will stop buying. The bootleg market will have received a staggering blow and will begin to decline.

The Senator is still optimistic as to the magic power of writing "Thou Shalt Not" in the statute

books. The only practical result of such an amendment to the Volstead Act would be to add to the criminal class of the country a number of men and women which can be roughly calculated by multiplying the number of bootleggers by the average number of customers served by each. The Senator's remedy is to have a large proportion of his fellow citizens "branded as lawbreakers" by an Act of Congress.

A great Englishman once said, in referring to the widespread disregard of the American Colonists for the laws enacted by Parliament: "You cannot indict a whole nation."

Chapter IV

Natural Liberty vs. the Enforcement Bureau

In addition to the things which the Volstead Act expressly or by necessary inference permits and for which there cannot be any prosecution in any event, there are certain acts which, though forbidden by the law, are beyond the reach of the long and extending arm of the Government because of barriers placed about the liberty of the individual which cannot be taken from him, altered, or abridged by any power whatever, or as Jefferson said, when advocating the Bill of Rights, "by any Government on earth." Certain of these unalienable rights are embodied in the Constitution as the Bill of Rights, not because they required the sanction of the Constitution—they antedated the Constitution as the heritage of all free Englishmen—but merely as a matter of added precaution, as a notice to Government that thus far "and no farther," as Blackstone said, "can natural liberty be restrained by human laws." These inhibitions on Government in the protection of the natural rights of man have hampered

the Prohibition Enforcement Bureau in its efforts "to stop drinking," but being superior even to that noble endeavor, have been upheld by the Courts. Some of the results of this conflict between natural liberty and the zeal of the Enforcement Bureau as enunciated by the Courts will now be considered.

Searches and Seizures

Section 25 of the Volstead Act providing for search warrants declares that "a search warrant may issue as provided in Title XI of the Public Law No. 24 of the 65th Congress approved June 15th, 1917." This law which is popularly known as the Espionage Act was passed while this country was at war with Germany. When one recalls the temper of the times, one might naturally assume that an Act governing the issuance of search warrants passed by Congress during the war might contain provisions which would not be adaptable to peace times; but an examination of the statute shows that although enacted under the stress of the war, it nevertheless had as its spirit the careful protection of the Constitutional rights of the individual. This law provides, among other things, as follows:

> A search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing the property and the place to be searched.

These words are practically parallel with Article 4 of the Amendments to the Constitution of the United States. The Act further provides that the search warrant may be issued by a judge of a United States District Court or by a judge of a state or territorial Court of Record or by a United States commissioner for the district where the property sought is located; and that the judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them, and that these affidavits or depositions must not merely set forth the grounds of the application or that there is probable cause, but must set forth the facts tending to establish the ground of the application or probable cause for believing that they exist. If, upon this evidence, the judge is satisfied of the existence of reasonable ground, he then issues a search warrant. The Act then provides that the search warrant may be served by any of the officers mentioned in its direction, but by no other person, and that it must be served in the day-time unless the affidavits submitted to the judge or commissioner are positive that the propetry is on the person or in the place to be searched, in which event, the judge may insert a direction that it be served at any time of the day or night. Furthermore, the warrant must be served and returned to

the judge or commissioner who issued it within ten days after its date, otherwise it becomes void. The Act further provides that "when the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken."

It further provides that any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000 or imprisoned not more than one year. It also provides that an officer who, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, is subject to a fine or imprisonment. A recital of these provisions of the law indicates that a search warrant is a serious instrument which is not to be issued lightly; and the Courts as a rule have required a strict compliance with its provisions on the part of the Government. (See Appendix B for the complete Act.)

In one of the recent cases, United States v. Martin, 33 Fed. (2nd) 639, decided March 26th, 1929, there was a motion to suppress evidence obtained upon a search and seizure under a "day-time search warrant" in the usual form issued by Commissioner Jenney at Boston. The officers entered upon the defendants' premises under the warrant on the same day it was issued, ten minutes after sunset. The

question presented was whether this was a legal service and the Court held that it was not, and entered an order suppressing the evidence obtained thereunder on the ground that day-time is the period between sunrise and sunset and that as the provisions of the statute for the issuance and service of search warrants must be strictly construed, the fact, as urged by the Government, that no inconvenience was suffered by Martin because of the elapse of ten minutes in the serving, was entitled to no consideration.

The extent to which the Supreme Court protects the rights of the individual is well illustrated in the case of Agnello v. United States, 269 U. S. 20, where the defendant was engaged in the trade of dope peddling.

Government agents went to the home of one Stephen Alba to buy cocaine. Alba sent a man named Centorino to get the drug, and some of the revenue agents who were stationed outside the house followed him. They saw him go into 167 Columbia Street, which was the home of Frank Agnello. In a short time he came out with Agnello and returned to Alba's house. Agnello there produced the cocaine which was then sold to the revenue agents, whereupon Alba, Centorino, Agnello and others who were present were arrested. Alba's house was then searched. The prisoners were also searched and packages of cocaine were taken from

Frank Agnello's pockets. While some of the agents were taking the defendants to the police station, other agents went to 167 Columbia Street and searched it, and in Agnello's bedroom found a can of cocaine which was produced and offered in evidence. The case involved the question of whether the search of the house of Frank Agnello and the seizure of the cocaine there found without a search warrant violated the Fourth Amendment, and whether the admission of evidence discovered by such search and seizure violated the Fifth Amendment.

The Court said:

The 4th Amendment is: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The provision of the 5th Amendment invoked is: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from the custody, is not to be doubted. See Carroll v. United States,

267 U. S. 132, 158; Weeks v. United States, 232 U. S. 383, 392. The legality of the arrests, or of the searches and seizures made at the home of Alba, is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. But the right does not extend to other places. Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrests. See Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391; People v. Conway, 225 Mich. 152, 195 N. W. 679; Gamble v. Keyes, 35 S. D. 645, 650, 153 N. W. 888. . . .

The protection of the 4th Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand special limitations have been set about the obtaining of search warrants for that purpose. Thus, the National Prohibition Act, approved October 28th, 1919, Chap. 85, Title II. S. 25, 41 Stat. at L. 305, 315, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for business purposes, such as a store, shop, saloon, restaurant, hotel or boarding house. And later, to the end that Government employees without a warrant shall not invade the

homes of the people, and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent, or employee of the United States, engaged in the enforcement of any law, to search a private dwelling house without a warrant directing such search. Act of November 23, 1921, Chap. 134, S. 6, 42, Stat. at L. 222, 223. Safeguards similar to the 4th Amendment are deemed necessary and have been provided in the constitution or laws of every state of the Union. We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect of intoxicating liquors, there are provisions similar to those in Sec. 25 of the National Prohibition Act. Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, Federal or State, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See Entick v. Carrington, 19 How. St. Tr. 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. See Temperani v. United States 299 Fed. 365.

In the case of De Pater v. United States, 34 Fed. (2nd) 275, decided by the U. S. Circuit Court of Appeals for the Fourth Circuit, on July 6th, 1929, the facts were these: Upon information that De Pater was making whisky, four Prohibition agents

drove to his home, a small farmhouse in Anne Arundel County, Maryland. As they were alighting from their car, De Pater came out of the house. They told him who they were and that they had a complaint that he was running a still. This he denied. They then told him that they could smell the odor of mash very distinctly and asked permission to go into the house and satisfy themselves. De Pater replied that they could not enter his house without a warrant. One of the officers then went to a window and, opening a shutter, looked in and found a fifty-gallon still, ten gallons of whisky and a number of barrels of whisky mash with all of the paraphernalia for manufacturing whisky. De Pater was then arrested.

Upon De Pater's trial for the felony, he made a motion to suppress the evidence. The motion was overruled and De Pater was convicted.

Upon appeal, the Court held that the evidence was obtained by an illegal and unreasonable search and should not have been admitted, and reversed the judgment of the lower Court. In its decision, the Court very strongly intimates, however, that where the officers, through their sense of smell, are convinced that a felony is being committed in their presence, they might make an arrest and bring the prisoner to trial purely on such evidence, despite its doubtful value.

The Court said:

Had this case been tried alone upon the testimony of the officers as to the knowledge acquired by their sense of smell, it might have justified a submission of that question to a jury and a verdict of guilty at their hands upon certain counts in the indictment. In such a case, however, there would have been excluded from the consideration of the jury supplemental testimony showing what was discovered by the forcible entry into the residence.

After pointing out that such evidence in the De Pater case would have been of a very doubtful quality, and after reviewing the decisions on the subject of Searches and Seizures, the Court further said:

We must determine the law as we find it, even though the result be greatly to hamper and embarrass officers in their efforts to curb the manufacture or illegal possession of whisky in private homes. Before its adoption, the National Prohibition Law was the subject of long and vigorous debate by both branches of Congress, and the restriction on the right of searches of private residences was not only provided by Section 25 of the Act, but further emphasized by Section 6 of the Supplemental Act of 1921. In determining the legality of searches under that law, the Supreme Court has carefully outlined the effect to be given these provisions.

This decision follows the reasoning of the Supreme Court in the case of U. S. v. Berkeness, 275 U. S. 149 where it is said:

Notwithstanding known difficulties attending enforcement of prohibition legislation, Congress was

careful to declare in the National Prohibition Act that mere possession of liquor in one's home "shall not be unlawful" and to forbid procurement of evidence through warrants directing search of dwellings strictly private not alleged to be used for unlawful sale. The definite intention to protect the home was further emphasized by Section 6, Act of 1921.

The emphatic declaration that no private dwelling shall be searched except under specified circumstances discloses a general policy to protect the home against intrusion through the use of search warrants.

Subterfuges of the Prohibition Bureau

The determination of the Supreme Court of the United States to protect the right of the individual "to be secure in his person, houses, papers and effects against unreasonable searches and seizures," has, no doubt, been a stumbling-block to enforcement officers; and the Department of Justice, in its prosecution of liquor cases, has naturally endeavored to obtain decisions which would weaken the effect of the Fourth Amendment. For example, it was decided long before the Eighteenth Amendment that the prohibition against unreasonable searches and seizures contained in the Fourth Amendment was aimed against the violation of that right by the National Government and not against its violation by an individual not acting for the Government, so that if evidence is obtained by an individual who

has come into your house and searched your papers and effects, the Government, in a prosecution based upon the evidence thus obtained, is not prohibited from making use of it. This would also apply if the evidence were obtained unlawfully by a state officer in the exercise of his alleged rights under the state laws; and the Government has endeavored to make use of this possible loophole in its prosecutions under the Volstead Act; but even here, the Supreme Court has determined that the right guaranteed by the Fourth Amendment is to be preserved and protected in its spirit as well as its letter, and is not to be taken away from the individual by any subterfuge. One of the leading cases on this phase of the subject is Gambino v. United States, 275 U. S. 310.

Gambino and Lima were arrested on August 21st, 1924, by two New York State troopers near the Canadian border. Their automobile was unreasonably searched without a warrant, intoxicating liquor was found, and they were arrested and indicted for conspiracy to import and transport liquor in violation of the National Prohibition Act. In advance of the trial, they moved for the suppression of the liquor as evidence, and for its return, on the ground that the arrest, the search, and the seizure were without a warrant and without probable cause in violation of the Fourth, Fifth and Sixth Amendments to the Federal Constitution. The motion was

denied. The evidence was introduced at the trial and the defendants were found guilty. The Circuit Court of Appeals affirmed the judgment, and appeal was taken to the Supreme Court of the United States where the judgment was reversed. Mrs. Willebrandt argued the case for the Government and urged that the New York troopers were state officers acting independently, and were not agents of the United States, and that if they obtained evidence illegally it was nevertheless admissible in the prosecution in a Federal Court; but this argument was rejected by the Supreme Court on the ground that as the Mullan-Gage law of New York had been repealed, the State troopers could not have been acting independently or in behalf of New York State, and must have been aiding in the enforcement of the Federal law. The Court said:

There is no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had. Unless the troopers were authorized to make the arrest, search and seizure because they were aiding in the enforcement of a law of the United States, their action would clearly have been wrongful even if they had positive knowledge that the defendants were violating the Federal law. No Federal official was present at the search and seizure; and the defendants made no attempt to establish that the particular search and seizure was made in

coöperation with Federal officials. But facts of which we take judicial notice (compare Tempel v. United States, 248 U. S. 121, 130) make it clear that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act; and that they made this arrest, search and seizure, in the performance of that supposed duty, solely for the purpose of aiding in the Federal prosecution. . . . Whether the laws of the state actually imposed upon the troopers the duty of aiding the Federal officials in the enforcement of the National Prohibition Act we have no occasion to inquire.

Since the decision in the Gambino case, there have been several instances where a state police officer has stopped an automobile for an alleged violation of a state traffic law, such as speeding, or driving without lights, and as an incident of the arrest for the violation of the state traffic law, has made a search of the automobile and has found liquor therein.

It is well recognized that a search following a legal arrest is not an unreasonable search, and the Federal Government has endeavored to make use of evidence thus obtained on that ground. Such evidence has been sustained in some districts and has been rejected in others. The question so far has not been decided by the Supreme Court; but in view of the jealousy of that Court to protect the individual in the rights guaranteed to him by the

Fourth Amendment, and in view of the previous decisions of that Court on the subject, it is highly improbable that they will permit any such subterfuge.

Another scheme adopted by the Government to overcome the prohibition against unlawful searches was to obtain a warrant to search for smuggled goods.

In U. S. v. Moore, 4 Fed. (2nd) 600, a search warrant for smuggled goods was obtained to search the caretaker's house on the estate of Mr. W. S. Moore of Bar Harbor. Liquor was found. Moore was indicted. This search warrant was not issued under the Volstead Act or the Espionage Act of 1917—but under Title 4, Section 595, of the Tariff Act of 1922, which has to do with the detection of smuggled goods. The search warrant was valid for searching a dwelling to find smuggled goods, and if there had been any reasonable ground for believing that the liquor had been smuggled the warrant would have been valid for that purpose and as a basis for a prosecution for smuggling. But Moore was indicted for the unlawful possession of intoxicating liquors under the National Prohibition Act. This is what the Court said about that procedure:

It by no means follows, however, that a search warrant, even when properly issued under the smuggling statutes, can be legally used to discover evidence of the commission of the crime of possession

of intoxicating liquors. A smuggling warrant cannot be used in lieu of and for the purposes of the warrants described in the Act of 1917. National Prohibition Act, Title 2, Section 25 provides that "no search warrant (for intoxicating liquors) shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor," or unless in part used for business purposes, etc., and that when that condition is shown to exist a search warrant may issue under the Act of June 15, 1917, and subject to its provisions, so carefully devised for the protection of the individual rights.

If a customs officer, having no reason to think that liquor is being sold, or ever was sold in a private dwelling, can, by the simple process of obtaining from a Justice of the Peace a warrant to search for smuggled goods, enter and search the dwelling for violations of the Volstead Act, and, upon finding liquor, proceed to have the owner indicted on that evidence for violation of that Act, the proceedings are not only a violation of the Prohibition Act itself, which specifies the only manner in which private dwellings may be searched, but they constitute a gross violation of the rights of the defendant under the Fourth and Fifth Amendments.

A citizen's constitutional right cannot be invaded in this way.

On the trial of this indictment the evidence obtained by the search and seizure referred to will not be admitted. The evidence is suppressed. If a motion is made to quash the indictment, and it should appear that it was found wholly on the evidence referred to, I should grant that motion.

"Respect for the law," said Justice Brandeis in Burdeau v. McDowell, 256 U. S., p. 477, "will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

Another way in which the Government has sought to overcome the handicap imposed on its operations by the Fourth Amendment to the Constitution is illustrated in the recent case of Alvau v. U. S., 33 Fed. (2nd) 467. Alvau was operating a complete still in two underground rooms which were led to by a secret opening in one of the walls of his basement. The officers entered and arrested Alvau after having been convinced by their sense of smell that intoxicating liquor was being manufactured somewhere in the house. After a thorough search they found the hidden still, a large quantity of mash and about forty gallons of whisky. He was indicted for violations of Sections 3266, 3281 and 3282 of the Revised Statutes of the United States which define offenses relating particularly to the manufacture of distilled spirits and the operation of distilleries when such operations were lawful and revenue-producing occupations. Alvau made an application for the suppression of the evidence thus obtained, but the Government contended that, since this prosecution was had under the Revenue Laws, a search warrant was not necessary, as Section 3276 of the Revised Statutes authorizes the entry and search of a distillery

without a warrant. This section provides that it shall be lawful for Revenue officers "to enter into any distillery or building or place used for the business of distilling or used in connection therewith for storage or other purposes and to examine, gauge, measure and take an account of every still or vessel or utensil of any kind." And it is further provided that "Whenever any officer having demanded admittance into a distillery or distillery premises, and having declared his name and office, is not admitted" it shall be lawful for him to make a forcible entry.

The Circuit Court of Appeals held that this provision does not apply to the manufacture of liquor in the home, but only to regular distilleries. The Court said:

> The distinction between this case and that of a registered distillery is broad and obvious. One who registers a still in effect consents to its being searched by proper officers at any time. One who does not gives no such consent, and for this reason the Statute has no application to him.
>
> We feel constrained to hold that the search was unreasonable and in violation of constitutional rights, and that therefore the evidence was inadmissible.

Entrapment

One of the results of the attempt to enforce National Prohibition is that, unlike the class of crimes involving moral turpitude, where members of society are willing and anxious to assist the Gov-

ernment in the apprehension of the criminal, the bootlegger is looked upon by many respectable citizens as a necessary evil. He is to an extent protected, and a customer would consider it in the nature of a breach of faith to assist in his prosecution. In ordinary crimes the Government acts upon the complaint of a citizen after the crime has been committed, while with Prohibition the Government is forced to employ agents to go out and assist in the commission of the crime in order to make a case.

There is a well recognized doctrine in criminal law, known as entrapment, to the effect that a person cannot be convicted where an agent of the Government induced the person to commit the crime for which he is prosecuted. Under free Governments the *"agent provocateur"* has always been an object of contempt.

As prosecutions in Prohibition cases commonly rest upon the evidence of spies the defense of entrapment has naturally been urged in many cases, and the Courts have been confronted with a serious problem in the application of the doctrine.

Obviously, where a detective plans a robbery his companions cannot be convicted as accomplices. (Shouquette v. State, 219 Pac. 727); but if the doctrine of entrapment were strictly applied to Prohibition cases it would be almost impossible to obtain a conviction. The problem has been solved by the

Courts in a line of decisions which seem to hold that if the agent has reasonable grounds for believing that a person is violating the law as a business he is justified in becoming one of his customers for the purpose of getting the evidence; but if the person had no intention of committing the crime and was tempted and induced by the agent to do the act he cannot be convicted. Where, for example, an agent came to a person's home, feigned illness, induced the householder to let him have "a drop of liquor," insisted on paying him for it, and then arrested the victim, the Court suppressed the evidence and acquitted the prisoner.

Spied

The work of the enforcement officer is recognized by the Courts to be difficult at best and they have stretched the interpretations of the law to favor their methods whenever possible. A rather amusing case was decided by the Circuit Court of Appeals for the Fourth Circuit in July, 1929. Fox v. U. S., 34 Fed. (2nd) 99. The names are real.

Eagle, a United States Commissioner, in order to obtain evidence against Fox, gave five dollars to a man named Allen with instructions to make a purchase of liquor from Fox. Allen informed Fox, through an attorney, of the plan to entrap him, and then gave him the five dollars and arranged that the liquor was to be delivered to him on the road near Hinton, W. Va. Fox took the five dollars and delivered it to the Clerk of the Court with instructions

that it be given to a charitable organization called the King's Daughters. He then filled a fruit jar with spring water in the presence of witnesses, and, taking it and the witnesses in his automobile, went to the agreed point on the Hinton Road. There his car was searched by Eagle's officers, the fruit jar of water was found, and Fox was placed under arrest.

In the District Court he was convicted on the charge of selling intoxicating liquor to Harry Allen and was sentenced to six months imprisonment.

On appeal to the Circuit Court the judgment was reversed, the Court holding that there cannot be a sale of liquor unless the sale was completed by delivery. The Court said: "The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property."

An interesting inquiry which is not disclosed from the record is whether or not Eagle was responsible to the United States for the loss of the five dollars, or whether the King's Daughters felt justified in retaining it.

Income Tax from Bootleggers

One of the anomalies of National Prohibition to which little publicity has been given is that the United States Bureau of Internal Revenue practically extends to bootleggers immunity from prosecu-

tion in an effort to collect a tax on their illicit income. The Supreme Court ruled in United States v. Sullivan (274 U. S. 259; 71 L. ed. 1037) that one engaged in illicit liquor traffic cannot refuse to make an income tax return, but if the form of the return calls for answers which he is privileged from making under the Fifth Amendment to the Constitution, he must raise the objection in the return. The point was made in the argument of that case as to whether the bootlegger in reporting the profits from his *business* might deduct amounts paid for bribery as a "business expense." The Court refused to decide this question, saying: "It will be time enough to consider that question when a taxpayer has the temerity to raise it."

Chapter V

Searches Legal and Illegal

Search of Automobile

What are your rights if you are peaceably driving your car along a public highway and a Federal officer stops you and demands to know whether or not you have any liquor in the car? Your first question should be whether or not he has a search warrant. He might well reply, "We don't need a search warrant to search an automobile." That is true. You should then ask: "What grounds have you for believing that my car contains liquor?" If the officer happened to see you stop at a well known bootlegger's place along the road and bring several bottles from his place into your car and if he had followed and stopped you, these facts might give him reasonable cause for believing that you were at the time transporting liquor, and he might have the right without a warrant to search the car and to arrest you for transporting liquor in violation of the law. If, however, he is acting on a mere suspicion and has no reasonable grounds for

thinking that you are transporting liquor, he has no right to search your car and you may refuse to permit the search, and if, against your protest, he makes the search and finds liquor, the law is well settled that you cannot be convicted on that evidence.

The law on this subject is clearly set forth in the case of Carroll v. U. S., 267 U. S. 132, in which the rule is laid down that in the case of an automobile or other moving vehicle, it is obviously impossible for an officer knowing that a crime is being committed, to go and swear out a search warrant before he can search the vehicle. Such a procedure would naturally defeat its own purpose. A distinction is therefore made as to a reasonable search where the place to be searched is stationary, such as a house or a store or a barn, and where the thing to be searched is an automobile or a motor boat or any other moving vehicle. In the latter case a search warrant is not necessary; but the officer who makes the search must have the same information which would have been necessary in order to obtain a search warrant. He cannot stop automobiles along public highways merely on the chance that the occupant may be transporting liquor. If your bottle has broken and the liquor is dripping on the highway and the smell of its contents is perceptible, he, of course, has reasonable cause for believing that you were transporting the liquor in your car, but a mere suspicion on his part is not sufficient.

The facts of the Carroll case were as follows: George Carroll was suspected by the Prohibition agents of being a bootlegger, and there seemed to be reasonable justification for this suspicion. His automobile was known to the agents. On the 15th of December, 1921, two of them saw Carroll coming from Detroit in his car and gave chase. When they caught up with him they stopped him, searched his car, and found behind the upholstering of the seats sixty-eight bottles of gin and whisky. Carroll was convicted, and upon an appeal to the Supreme Court of the United States, the question was presented as to the legality of the search. The Court held that the search was legal, that is, it was not unreasonable. It was pointed out that the Fourth Amendment prohibits *unreasonable* searches, but does not prohibit all searches. The Court then reviewed the history of the law of searches and seizures, and continued:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can

be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. . . .

The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported. . . .

Such a rule fulfils the guaranty of the 4th Amendment. In cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit, and issued after judicial approval, protects the seizing officer against a suit for damages. In cases where seizure is impos-

sible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. United States v. Kaplan, 286 Fed. 963, 972. . . .

But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which, in the judgment of the Court, would make his faith reasonable.

See also Munns v. De Nemours, 3 Wash. C. C. 37, Fed. Cas. No. 9,926

In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure This is to say, that the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

The opinion in the Carroll case was delivered by Chief Justice Taft. A vigorous and learned dissenting opinion was filed by Mr. Justice McReynolds in which Mr. Justice Sutherland concurred. "The damnable character of the bootlegger's business," said Justice McReynolds, "should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods." He reasons that, on the admitted facts in the Carroll case the agents merely had a suspicion that the car might contain liquor. They were not out looking for that

car, but were doing patrol duty when the Carrolls drove by. He argues that the facts shown are not sufficient upon which to predicate reasonable or probable cause for believing that the car at that time contained any liquor.

An able and scholarly criticism of the Carroll decision will be found in the *Columbia Law Review* for December, 1929, in an article by Professor Forrest R. Black of the University of Kentucky. He points out how, in order to give efficacy to the prohibition against the transportation of liquor in automobiles, the Court has made a rule which, by accumulating precedents, might tend seriously to weaken the constitutional guaranty of the Fourth Amendment.

The trouble with the Carroll case is that the officers who stopped the car had no definite facts on which to base a belief that the car at that moment contained intoxicating liquor. They knew the occupants as suspected bootleggers and they merely guessed, from the direction in which they were going, that they were transporting contraband goods.

The law is well settled, however, that unless the arresting officer has facts on which to predicate his belief, he has no right to stop you and search your car. The same rule would no doubt apply to your motor boat or other pleasure craft. And it must be borne in mind that the mere result that liquor is in fact discovered does not make the search legal. The

search is either legal or illegal, irrespective of what is discovered.

It happens that a great many people have lost their constitutional right to object to an illegal search by permitting the search, or by disclaiming ownership of the property, or by voluntarily delivering up their property, or throwing the liquor out of the car and breaking the receptacle. When your constitutional rights are being violated, stand on them frankly and fearlessly.

Forfeiture of Vehicle

Section 26 of the Volstead Act provides for the forfeiture of the automobile, boat, or other vehicle engaged in the unlawful transportation of liquor; but it protects the rights of an innocent owner of the vehicle who had no notice of its unlawful use.

As is generally well known a large number of automobiles are sold today on the partial payment plan, the automobile company or its acceptance corporation retaining title to the automobile until the purchaser has made his final payment thereon. This right of the innocent owner to protect his interests in his property was a source of annoyance to the Prohibition Bureau who took the attitude that the car should be forfeited despite the rights of anybody, innocent or otherwise, on the theory that the car itself had been a violator of the law. This ridiculous theory is not so surprising as it may seem at

first blush, because under Section 3450 of the revised statutes, relating to the payment of taxes on liquor, when the manufacture of liquor was legal, the vehicle in which liquor was concealed for the purpose of evading the tax was forfeited and no provision was made for the protection of the rights of an innocent lienholder. The Prohibition Bureau therefore early adopted the plan of proceeding against automobiles under this old tax law passed in 1866, namely Section 3450 of the revised statutes, rather than under Section 26 of the Volstead Act. As it is impossible to pay a tax on unlawfully made whisky, it is a mere subterfuge for the Government to proceed under Section 3450. As was said in the recent case of U. S. v. One Buick Coach, 34 Fed. (2nd) 318:

> The whole atmosphere of this case forces the conclusion that the Government is attempting to proceed under an old revenue statute for the very purpose of cutting off the rights of innocent lienholders.
>
> He (the defendant) did not know that a tax was due. If he did not know that a tax was due how could he intend to defraud with reference thereto? He did not transport, possess, or conceal with intent to defraud the United States of a tax, but with the intent to commit an offense against the National Prohibition Act.

The latest case from the Supreme Court on this subject is Richbourg Motor Co. v. United States, de-

cided May 19th, 1930, 74 Law Ed. 503, in which the Court held that where transportation is involved the Government must proceed under Section 26 of the Volstead Act and not under United States Revised Statutes S. 3450. In its opinion, the Court said:

In providing for forfeitures under this section, Congress was not unaware that the enactment of the National Prohibition Act would enormously increase seizures of vehicles, beyond those made under Section 3450, and that their forfeiture would place an increased and heavy burden on many innocent persons, unless afforded some protection by the new legislation. By Section 26 it gave such protection in all cases where the prosecution of the person guilty of the transportation is had under the National Prohibition Act. This would have been but an idle gesture and the congressional purpose would have been defeated if, in practically every case where the transporting vehicle is seized, the prosecuting officers could compel forfeiture of the interests of innocent third persons under Section 3450. Yet, that is the effect of the construction of Section 26 contended for by the government, since, with the enactment of national prohibition, there can be few cases of illegal transportation which do not involve the concealment of nontax-paid liquor. See United States v. One Ford Coupe Auto (272 U. S. 326).

In the case of U. S. v. One Ford Coupe, cited by the Court, no actual transportation was involved, and a divided Court held, on extremely technical

grounds, that under the facts in that case a forfeiture of the vehicle under R. S. 3450 was permissible. Mr. Justice Butler filed an able dissenting opinion, in which he was joined by Justices McReynolds and Sutherland, pointing out the absurdity of forfeiting the automobile for the non-payment of the tax when it was utterly impossible to pay the tax and where the National Prohibition Act, recognizing the changed status of liquor from a taxable to a forbidden product, provided expressly for the protection of innocent persons.

Unless the Richbourg case can be considered as overruling the Ford Coupe case, the only possible reconciliation of the two opinions would seem to be that the interest of an innocent owner or lienholder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is engaged in transportation. It may require yet another decision to determine when an automobile is engaged in transportion; for obviously, in the act of transporting merchandise from one point to another, it is not essential that the vehicle keep in motion the entire way. Stops may be made for many purposes, ranging in time from a few minutes for changing a tire, to several hours for sleep and refreshment. It would have clarified the law if the Court had stated that the Richbourg decision was meant to overrule the decision in the Ford Coupe case. Standing together the two cases merely add to

that "bewilderment" which Justice McReynolds foresaw in June 1920.

But whatever the technical sanction, under any set of facts, for a proceeding to forfeit the vehicle under Section 3450 rather than under Section 26 of the Volstead Act, such a procedure by the Prohibition Bureau certainly falls within the condemnation by Justice Brandeis, quoted above, of "means which shock the common man's sense of decency and fair play."

There is indeed something incongruous in the idea of the forfeiture of a vehicle which is engaged in the violation of the liquor laws. A man may use his automobile to rob a bank and make his get-away. He may use it to take his enemy out to a lonely roadside to be murdered, or to transport the body of a murdered victim to a hiding place. He may use his automobile in connection with the commission of almost any crime, but unless it be connected with the Prohibition law, there is no thought on the part of the Government of taking the car away from the man or his heirs. It remains his property no matter what happens to him. Even if he is executed for his offense, his widow and children are entitled to his automobile as a part of his estate. But if a man be found transporting a pint of liquor in his car, he may not only be thrown into the penitentiary but his car may be taken away and sold, and the proceeds kept by the Government.

Search of Person

Suppose you are walking on the street with a package in your hand which contains a bottle of liquor. As you pass a Federal Prohibition officer he stops you and inquires what you have in the package. What are your rights? You should demand to see his search warrant, and refuse to let him examine the package without one. If he has a warrant particularly describing you and the thing to be seized you must submit to the search, otherwise you should politely refuse him any information. Suppose, however, he goes further and takes the package away from you by force. What then? The Court has answered that question in Synder v. U. S., 285 Fed. 1. The facts were these: Snyder was standing on the street in Wheeling, W. Va. A Federal Prohibition officer observed that the inside pocket of his overcoat bulged and that the neck of a bottle protruded therefrom. He walked up to him and lifted the bottle halfway out of his pocket and saw that it contained liquor. Snyder protested and demanded to see his search warrant, but the officer said he had him with the goods, and took him into a near-by store where he searched him and found three other bottles of whisky. The Court held that the arrest and search were illegal; the evidence so obtained was excluded, and Snyder was acquitted.

This rule that evidence illegally obtained cannot

be used, which may seem peculiar to the lay reader, is now firmly established by the Federal Courts. Its history is rather interesting. Until 1885 the common law rule prevailed in this country that evidence was evidence no matter how it was obtained. But in the case of Boyd v. United States, 116 U. S. 616, the Supreme Court decided that in order to give effect to the Fourth and Fifth Amendments all evidence obtained by an illegal search must be excluded. In an interesting paragraph in that decision, the Court touched on the reasons for these amendments in the following words:

> In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book"; since they placed the "liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the

mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child independence was born."

In Bram v. United States, 168 U. S. 532, the Court in affirming the Boyd case said:

It was in that case demonstrated that both of these Amendments contemplated perpetuating in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.

The doctrine was again forcefully announced in Weeks v. United States, 232 U. S. 383, when the Court said:

The effect of the 4th Amendment is to put the Courts of the United States and Federal officials, in the exercise of their powers and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.

This principle, now firmly entrenched in our Federal law, cannot be altered by any act of Congress, for what is an "unreasonable search" is in the final analysis a judicial, and not a legislative question.

But although Congress cannot authorize searches which are unreasonable, it may prohibit searches that are reasonable. In Section 25 of the Volstead Act, it has specifically prohibited the issuance of a warrant to search any private dwelling unless it is being used for business purposes or for the sale of liquor, thus expressly recognizing the right of each individual to drink in his own home and dispense his hospitality as he pleases without any governmental interference whatever.

Dining in a Restaurant

Raids of a particularly unpleasant character have been conducted recently in the New York district under the following circumstances: Ladies and gentlemen are dining quietly at a fashionable hotel or at the Casino. They are in evening clothes; music, light laughter, dancing, excellent cuisine, all contribute to the happiness of the occasion and create an atmosphere of refinement and graceful living. The faultlessly attired gentleman at the next table has been watching you like a hawk; he sees you pour a liquid from a bottle or flask. He sees that others are doing likewise. He then advances to the leader of the orchestra, and under the color of his authority as a prohibition agent orders the music to stop. He commands the guests to return to their tables; at his signal other agents appear at the door and arrests are made. You are separated from your

companion, perhaps your wife or daughter, and are taken before a magistrate and must find bail for your appearance before the commissioner in the morning. You feel that in some way you have been outraged; that certainly Washington, Franklin, Madison, Hamilton and the other patriots who founded the Federal Government could not have contemplated that it would thus inject itself into the private lives of its citizens; that men would be torn from their families and arrested because their habits of dining were not approved by the government at Washington. Certainly, you say, if such things can be, the fathers neglected to impose sufficient barriers between aggressive government and personal liberty; the Bill of Rights are incomplete.

Such arrests are seldom brought to trial. The reason for making them is not clear unless it be for the headlines which appear in the press the next morning. In most cases the arrest is illegal, without a warrant, and not based on probable cause. The prohibition bureau knows it cannot obtain a conviction, and the case is dropped. What is your redress?

In the first place, before submitting to arrest you have the right to know the name of the agent, to demand the production of a warrant if he has one; or, if he is acting without a warrant, to demand an explanation of the charge against you. You can-

not be arrested because you drink something from a bottle. Perhaps the bottle contained tea or medicine. Your person and effects are not subject to search without a warrant. The agent is generally acting on a bare suspicion on his part and, the chances are, is relying upon your ignorance of your rights in order to carry out his part of the staged spectacle. You are but the unfortunate victim of his chief's desire for newspaper publicity. Perhaps, upon a proper and tactful line of questioning the agent will decide to pick another victim. If, however, he insists upon making the arrest it would be well to remind him of his own liability in the matter, for without a warrant he acts at his peril. And a warrant to search the premises is no authority for the search of a person who happens to be there as a customer.

Bags, Luggage, etc.

A person's baggage or luggage is not subject to search without a warrant unless he is crossing an international boundary. An officer, therefore, has no authority to arrest without a warrant one who he merely suspects is illegally transporting liquor in a suitcase; but where one, who is afraid that his suitcase might be searched, voluntarily abandons it, or where the owner of a suitcase disclaims ownership, he cannot later object to a search by the officer. As said before, where one's constitutional rights are

involved he need not resort to subterfuge. The courts will protect him.

Private Motor Boats and Yachts

We have seen that under the Carroll decision, the Supreme Court has laid down the rule that although a search warrant is not necessary in the case of an automobile or other moving vehicle where there is reasonable ground for believing that it is being used for the illegal transportation of liquor, "it would be intolerable and unreasonable if a Prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highway to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary, as protection, reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in, but those lawfully within the country entitled to use the public highways have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

How far this doctrine would be applied to the illegal search of a private motor boat or yacht being used for pleasure within the territorial waters of the United States has not as yet been judicially

decided by the highest Court. What actually happens in such cases is that the search and seizure is generally made by officers of the customs or of the Coast Guard, and Section 581 of Title IV of the Tariff Act of 1930 appears to authorize such officers to hail and stop any vessel within four leagues, that is twelve miles, of the coast of the United States. The pertinent parts of that Section read as follows:

> Officers of the customs or of the Coast Guard . . . may at any time go on board of any vessel or vehicle, at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

The wording of this section would seem on its face to authorize officers of the customs or the

Coast Guard to stop, board and search any vessel within the territorial waters of the United States or within twelve miles of the coast, but as every law must be read and construed in connection with the subject matter involved, and as the Tariff Act concerns itself purely with the collection of customs and duties, and as this section has to do solely with the enforcement of the Tariff Act, it is doubtful if the Supreme Court would permit this provision to be used as a subterfuge in the enforcement of the National Prohibition Act. This seems especially clear when the language of the Court in the Carroll case is applied to this section, because it will be noted that this section does not confine itself merely to vessels but also applies *to vehicles at any place in the United States.*

The District Court seemed to take the above view of the law in the case of Burns v. U. S., 296 Fed. 468. The facts in that case were as follows: Two deputy collectors of customs and two Prohibition agents, while cruising in a motor boat sighted a schooner within the three-mile limit proceeding on her voyage near the coast of Florida. They pursued her and seized her about eighteen miles out at sea, and found two hundred and forty-five cases of liquor on board. The Court held that as the vessel had not arrived within the limits of any collection district within the meaning of R. S. Sec. 2773 (Comp. Stat. 5469) so as to confer upon customs officers

the right to seize her, the evidence so obtained was inadmissible. The Court said:

> The customs officers had no search warrant. They had not discovered the Junior in the violation of any law, and they had no right to board her or to seize her.

Certain it is that if the Carroll case means anything, it means that it would be intolerable and unreasonable for the Government to subject all persons lawfully using the territorial waters of the United States with their families and friends to be subjected to the inconvenience and indignity of such a search.

There is something about a uniform which affects the personal bearing of the wearer. Clothed with the habiliments of authority he assumes an attitude of superiority, often an overbearing and chesty manner which repels a calm inquiry as to the source of his powers. This attitude combined with his possession of firearms makes it dangerous for the private yachtsman to refuse to stop in compliance with a coast guardsman's hailing orders. Having stopped, however, another question arises when the guardsman comes alongside. Unless he has reasonable grounds to believe that your vessel is engaged in importing he has no more authority to search it for contraband merchandise than he would have to search your automobile; and the rule as laid down in the Carroll decision should govern. A search

under such circumstances without the production of a proper search warrant should be refused; and if conducted in spite of your protest, and intoxicating liquors are found and seized, their return should be demanded together with a motion to suppress the evidence.

Smuggling

The smuggling of liquor into this country is covered by the Tariff Act of 1930, and a prosecution for that offense does not necessarily fall within the provisions of the Volstead Act. Customs officers have from time immemorial been authorized to search the persons and baggage of those who are entering the country either at a port of entry or over an international boundary, and Section 582 of the Tariff Act provides that "all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government."

Schedule 8 of the Tariff Act of 1930 provides for a duty of $5.00 per proof gallon on distilled spirits, $6.00 per gallon on champagne, $1.25 per gallon on still wines, and $1.00 per gallon on ale, porter, stout, beer, etc., but as paragraph 814 provides that "no wines, spirits or other liquors containing one-half of one per cent. or more of alcohol shall be imported or permitted entry except on a permit," it would not do the traveler any good to declare this

sort of merchandise and attempt to pay the duty thereon. His property would be subject to seizure and forfeiture. If he does not declare it he is guilty of smuggling under Sec. 593 of the Tariff Act. Thus, there is no way in which liquor can be lawfully brought into the United States except under a permit from the Treasury Department.

As a practical matter, from the revenue producing standpoint, intoxicating liquors may be considered as on the free list!

Right of United States Vessels to Sell and Transport Liquor

The Volstead Act has no application outside of the territorial limits of the United States, that is, outside of the three-mile limit. As was said by the Supreme Court in Cunard S. S. Co. v. Mellon, 262 U. S. 100:

> Examining the Act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside territorial waters of the United States, and thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters.

As a result of this decision the Treaty of 1924 with Great Britain was made, by which England

gave the United States the right to board English vessels outside the three-mile limit and within one hour's sailing distance from shore, in exchange for the right granted by the United States to English vessels to bring in liquors as sea stores kept under seal while the vessel is within the "territorial waters" of the United States. Article I of the Treaty expressly reaffirms the meaning of "territorial waters" in these words:

> The high contracting parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outward and measured from low water mark constitute the proper limits of territorial waters.

It is clear, therefore, that owners of American ships are thoroughly law abiding and within their rights in selling liquor to their passengers when outside the three-mile limit; and citizens of the United States are not violating either the letter or the spirit of the law in purchasing and consuming liquor under such circumstances. It of course goes without saying that when an American is on foreign soil his conduct is subject only to the laws of that country, just as a foreigner in America is subject to our laws. When in Rome one does as the Romans do.

Chapter VI

Have We Any Redress?

A very practical question which may occur to the reader is this: "Suppose my liquor has been seized by a prohibition officer without a search warrant or under an illegal search warrant, or unreasonably, in cases where no search warrant is required, and suppose upon my motion the Court suppresses the evidence and dismisses the complaint; what redress have I for the annoyance to which I have been put by the illegal act of the enforcement officer?" The answer to this question is clear. You have a right of action for damages for an unlawful arrest. Furthermore, in the Willis-Campbell Act, it is expressly provided in Section 6:

That any officer, agent or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or prop-

erty, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000 and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

You can therefore not only sue the officer for civil damages, but you can have him prosecuted criminally under the above section. The average citizen, however, knowing the trouble and delay to which he would be put in obtaining a civil judgment against the Prohibition officer and the slim probability of collecting the judgment, even should he obtain it, would hesitate to pursue such a remedy; and as the prosecution of the Prohibition officer for the criminal offense would probably be removed to the Federal Court, this satisfaction, too, is doubtful.

Prosecution of Prohibition Agents for Crimes of Violence

A Prohibition agent has no right to shoot a person who is fleeing to escape arrest; nor has he the right to shoot at the tires of an automobile which he believes to be transporting liquor (U. S. v. Kaplan 286 Fed. 963, 972); but as many enforcement officers are, if the records of the civil service examination can be relied on, men of rather inferior mentality and also men of doubtful scruples, if the record of dismissals for dishonesty and the refusal of Congress to forbid the employment of felons are a guide

we cannot be surprised to find a large number of crimes of violence committed by them under color of their authority. The Association Against the Prohibition Amendment has recently made a survey of 184 cases of citizens killed by Federal Prohibition agents. Only 56 of the offenders were indicted. Of these, only six were convicted; one of second-degree murder, one of manslaughter, two of assault and battery, and two of involuntary manslaughter.

One may ask why have so few convictions been obtained in such cases; but when all things are considered, the wonder is that there have been so many. In the first place, not all of these deaths were wrongful. Some of them were doubtless justifiable homicides; but eliminating them and considering only those cases where the officer was guilty and deserving punishment, since experience has shown that the enforcement of Prohibition cannot be attempted without the resort to violent methods and that by such methods the loss of life is apparently inevitable, both judge and jury would generally consider it unfair to convict unless actual personal malice on the part of the agent were proved beyond a reasonable doubt.

Furthermore, the agent is an officer of the Government and the Prohibition Bureau is somewhat on the defensive regarding the use of firearms by their agents, consequently such a man is in a peculiarly favorable position as a defendant. It is to the

interest of the Prohibition Bureau to prove that the slaying was either in self-defense or accidental; and the official reports of the occurrence generally bear out that theory of the case. Again, if the accused agent chooses, he may have his trial removed from the State Court to a Federal Court, and in these removal proceedings, the United States District Attorney represents him. When the case comes up for trial he acts as the attorney for the defense. The position of the state prosecuting attorney is, under these circumstances, a very difficult one at best. He cannot approach his task with much hope of victory. The atmosphere seems to be all against him and in favor of the accused.

The right of the officer to have his case removed to a Federal Court is given by Section 28 of the Volstead Act, which reads as follows:

> The Commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

This provision carries out a policy which originated in 1833 when South Carolina attempted to nullify the customs laws of the United States and to proceed criminally against Federal collectors in

that district. Congress then passed an Act providing that in any criminal prosecution or civil suit against such an officer "on account of any act done under color of his office," the suit or prosecution "may at any time before the trial or final hearing thereof be removed for trial to the District Court." This privilege was later broadened to cover internal revenue officers, and now, as we have seen, has been made to apply to Prohibition officers.

A full discussion of the law governing the removal of criminal cases from a State Court to the U. S. District Court will be found in the three cases entitled Maryland v. Soper reported in 270 U. S. at pages 9, 36, and 44. Chief Justice Taft delivered all three opinions. These cases involved petitions by the State of Maryland for writs of mandamus to compel District Judge Soper to remand to the State Court indictments for murder, conspiracy, and perjury which the judge had removed from the State Court to his Court. The writs were granted; granted, however, not because the right of removal was questioned, but because the facts in these particular cases did not justify the removals. In the first case the Court held that the averments in the petition (for removal) were not sufficiently specific and positive to entitle the defendants to a removal; in the second and third that the prosecution was not for acts done by the defendants solely in pursuance of their Federal authority. It is fundamental

that if the officer is not acting in pursuance of his authority as an officer of the United States he stands in no better position than a private citizen who is charged with a crime against the state, and thus is not entitled to this extraordinary privilege of removal.

Recovery of Liquor Illegally Seized

Another question, however, of much more practical significance which the reader will be justified in asking is, "How about my liquor? The Court has decided that it has been illegally taken from me, and now I want to get it back." This question is not so easily answered. There are decisions each way. The confusion seems to be brought about by the wording of Section 25 of the Volstead Act, which provides that "it shall be unlawful to have or possess any liquor intended for use in violating this title and no property rights shall exist in any such liquor." But, if we turn to Section 33, we find that "it shall not be unlawful to possess liquors in one's private dwelling, provided such liquors are for use only for the personal consumption of the owner thereof and his family and of his bona fide guests when entertained by him therein." The result of these two provisions should make the law quite clear that if liquor is taken from a person's house by an illegal search and seizure, or from his boat, if more than three miles out, the Court should order it restored to him

because its possession in his home or his boat was not unlawful; but if the liquor should be taken from his person or from his automobile or motor boat within "territorial waters" by an illegal search and seizure, the liquor should not be restored to him because, despite the fact that he cannot be convicted on the evidence so obtained, the liquor was actually being transported and was therefore being used in violating the statute, thus bringing it under the provisions of Section 25.

The Supreme Court in the case of Amos v. United States, 255 U. S. 313, decided in February, 1921, ordered the return of liquor to the defendant upon the following facts: Amos kept a store which was connected with his home, and while he was away, two revenue agents came and told his wife that they were revenue officers and had come to search the premises for violation of the Revenue Law. The woman opened the store. The officers entered, and in a barrel of peas found a bottle containing almost a half-pint of illicitly distilled whisky. They then went into his home and on searching found two bottles under the quilt of his bed.

Upon his trial Amos submitted a petition for the suppression of the evidence and for the return of his liquor. The Court denied his petition and he was convicted.

The Supreme Court, however, reversed the judgment of the District Court and held that as the

property was seized by Government agents without a search warrant in plain violation of the Fourth and Fifth Amendments to the Constitution of the United States, the motion for the suppression of the testimony should have been granted as well as the petition for the return of his property. This is a strong case in view of the fact that Amos's house was in part used as a store.

It happens, however, that in spite of this decision by the Supreme Court of the United States, some of the Judges of the District Courts continue to exercise their own discretion. No one realizes this more than Vincenzo Baldi.

In a recent case entitled *"In re Baldi"* decided by the District Court for the Eastern District of New York, July 16th, 1929, and reported in the *Federal Reporter,* Volume 33 (2d), p. 973, the Court stated the question involved as follows:

> This is a motion for the return of some 26 barrels of wine alleged to have been taken unlawfully by police officers and by them delivered to the United States government. There is no question that the liquor was seized unlawfully. The only remaining question is whether, having thus been unlawfully seized, it should be returned to the person from whom it was taken.

The Court held that the term "intoxicating" as used in the Volstead Act cannot have two different meanings and that as it is defined in Section 1 as

any fermented liquor containing one-half of one percent of alcohol by volume, the term "non-intoxicating" as used in Section 29 must mean a beverage containing less than one-half of one percent of alcohol. The Court then said:

> I am in consequence unable to agree that it is lawful to manufacture, even in one's own home and for one's own use, beverages that contain more than one-half of one per cent. of alcohol by volume.

He therefore held that Baldi's possession of this wine containing 13 per cent of alcohol was unlawful and the motion for its return was denied. Baldi did not appeal. He had lost his wine and saw no chance of recovering it even if he won his appeal; and he had no money to waste on an academic question. The decision is clearly wrong as it renders Section 29 meaningless. It is also in conflict with the decision of the Circuit Court of Appeals in Isner v. United States, 8 Fed. (2nd) 487 which held that before one can be convicted for manufacturing wine in his home the product must be proved by the Government to be intoxicating in fact.

Until the Supreme Court clarifies the question we shall find different districts and circuits giving different interpretations of this ambiguously worded section, a section deliberately made so by Congress.

The Baldi decision, though having no especial force, is further subject to criticism in that although

acknowledging that there was no question that the wine was seized unlawfully, the Court gave the poor victim no redress whatever. Mr. Vincenzo Baldi is still wondering what it is all about.

Chapter VII

"The Bewilderment Which It Creates"

It may seem strange to the layman that there is so much confusion and doubt among the Courts as to the proper interpretation of the Eighteenth Amendment and the Volstead Act; why, in the first place the Courts in different circuits decide the same question of law in different ways, and why in the same circuits we find the District Courts so often reversed by the Circuit Courts on the same set of facts. If the judges do not know what the law means, how can the ordinary citizen be supposed to know? That is a fair question.

The explanation of this confusion in the interpretation of the law is not far to seek.

In the *New York Times* of October 9th, 1929, appears the headline: "Dry Leaders Back Penalty on Buyer." The article then states that "the dry forces will support Senator Sheppard's proposal to amend the Volstead Act by making the purchase of intoxicating liquor a crime." "Leaders of the dry organization declared today that such a move was

made necessary by the recent Court decision in Philadelphia holding that a liquor buyer could not be punished." Bishop Cannon is then quoted as follows, speaking of the Sheppard Bill:

> It is logical and necessary for the effective enforcement of the prohibition law.
>
> The purpose of the Eighteenth Amendment is to prohibit the traffic in intoxicating liquor, the use of which causes men to lose control of their physical, intellectual and moral power, and then become not only hurtful to their own interests but a menace to the entire social order of which they are a part.
>
> Buyers and sellers are both necessary for the traffic, and both are therefore equally responsible for its continuance.
>
> We repeat that the time has come to put the buyer and seller on exactly the same footing before the law—as equally hostile to the great purpose of the Eighteenth Amendment, the prohibition of the traffic in intoxicating liquors, with all the pauperism, misery, insanity, vice and crime which always and inevitably follow in its wake. For the good of our country and in the name of the constituency which we represent we appeal to you to give your aid in the prompt passage of this greatly needed legislation.

The foregoing is a fair illustration of the avowed purpose of what is called Prohibition. Now examine again the Eighteenth Amendment. What does it prohibit? Five clearly defined transactions. The manufacture, the sale, the transportation, the impor-

tation and the exportation of intoxicating liquors for beverage purposes.

If a law is intended to prevent murder what would be the result if it were worded, "The manufacture, sale, transportation, importation and exportation of firearms, weapons, poisons and other articles for murderous purposes is hereby prohibited?" Obviously it would lead to an endless amount of litigation as to just what it does mean. You will immediately say that it would be a foolish way to phrase a law to prohibit murder. But that is a fair illustration of the way the Eighteenth Amendment has been phrased to prohibit drinking if that is its real purpose. And many of the Courts have construed the Amendment as having that purpose in view. The Volstead Act even contains a direction to the Courts so to construe it. But if that was the purpose of the Amendment, the clear and straightforward way to express that purpose would have been, "The use of intoxicating liquors as a beverage is hereby prohibited." That at least would have simplified the work of the Courts in construing the Amendment.

Not having been written that way, and the Constitution being recognized as the most carefully drawn charter of government in the world, the Amendment ought to be construed as written. Congress admittedly has only such powers over the subject as are delegated to it by the Amendment. Let us see then where we are led if we assume that the

Amendment really means what it says. Its terms are simple enough. Every high school student can give a fairly clear definition of the term "manufacture" or the term "sale." The word "transportation" may give him some slight difficulty; but "importation" and "exportation" are self-explanatory.

Suppose then we build up the Amendment from the beginning and say, "The manufacture of intoxicating liquors for beverage purposes is hereby prohibited." Would Congress be justified in prohibiting the *possession* of liquor; or would the Courts be justified in declaring that this prohibited the State of New York from manufacturing liquor for medicinal purposes, or that it empowered Congress to prohibit a corporation from manufacturing alcohol for use in its varied industrial products? Obviously not.

Now let us add the word "sale" and have the Amendment read: "The manufacture or sale of intoxicating liquors for beverage purposes is hereby prohibited." Would the addition of the word "sale" enlarge the meaning of the word "manufacture"? Obviously not. It would merely make the sale for beverage purposes an additionally forbidden act. Now add the word transportation and apply the same reasoning, and then add the words "importation" and "exportation" and you have completed the Amendment. No one of the terms enlarges the others; each adds a forbidden act. The Amendment presumably could have gone further and given Con-

gress power to regulate the source, the use and the distribution of industrial alcohol, and the prescribing of liquor by physicians in the treatment of diseases. But it did not.

Now compare the clear terms of the Amendment with the title of the Volstead Act:

> An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

We immediately begin to grasp one of the reasons for the confusion and misinterpretation which we find in the minds of Congress, the clergy, and the Courts themselves. The dilemma may be briefly stated as follows: If it were the purpose of the Amendment to prohibit the use of intoxicating beverages, a very roundabout and unsatisfactory way of saying so was adopted; if the Amendment did not mean to prohibit the use, but actually means what it says, Congress has enacted a mass of unauthorized legislation and the Courts have misinterpreted five very simple and easily definable words. Certainly a joker has no place in the Constitution of the United States. Concealment of purpose in that instrument deserves no sanction from the Courts of the land. *"Ita lex scripta est"* is a cardinal rule in the interpretation of the Constitution.

Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, p. 188, said: "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

Another reason for the confusion in the interpretation of the Act by the different Courts is doubtless the fact that the subject of Prohibition is loaded with feeling and passion. Judges have actually been selected or rejected upon their known sentiments on the liquor question, and where a law such as this raises so many close questions for judicial interpretation it is not surprising that decisions should vary in the different circuits. One of the most recent appointments to the Federal bench is that of Judge Richard J. Hopkins of Kansas, an ardent Prohibitionist and an ex-officer of the Anti-Saloon League.

In the preparation of this outline the author has endeavored to state the law as he finds it today. The future is in the hands of the Supreme Court of the United States. As was said with prophetic wisdom by Mr. Justice McReynolds in his concurring opinion in Rhode Island v. Palmer, 253 U. S. 350:

"THE BEWILDERMENT WHICH IT CREATES"

It is impossible now to say with fair certainty what construction should be given to the Eighteenth Amendment. Because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution here.

This bewilderment, created in the mind of the distinguished justice of the Supreme Court, and the impossibility of saying with fair certainty how the amendment should be construed, has been forcibly illustrated by the recent case of U. S. v. Farrar. This was a test case. The Senator who drafted the Amendment had asked the Attorney General of the United States whether Section 6 of the Volstead Act makes the purchaser guilty of a crime. The Attorney General replied that he would have to wait for the Supreme Court to decide that question. The fact that Section 6 applies only to purchases of liquor for non-beverage purposes should have been clear to both the Senator and the Attorney General; but this simple inquiry had to be one more of the multitude of questions which have arisen to demand solution by the Court. In such a state of confusion the doctrine of *"ignorantia juris"* is harsh indeed when applied to a mere citizen of the Republic.

APPENDIX A

ANNOTATED CONSTITUTION OF THE UNITED STATES

[*Preamble*]

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

[*Legislative Department*]

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes[1] shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation

[1] Amended by the 16th Amendment.
[2] Partly superseded by the 14th Amendment.

from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.[3]

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall

[3] Amended by the 17th Amendment.

be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore,* in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first

Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury

of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections,

to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appro-

priation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Consti-

tution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.[4]

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts

[4] Amended by the 16th Amendment.

and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

[*Executive Department*]

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[5] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such num-

[5] The following paragraph was in force only from 1788 to 1803.

ber be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[6]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age

[6] Superseded by the 12th Amendment.

of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer

in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of

adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

[*Judicial Department*]

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies

to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;[7]—between citizens of different States,—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason

[7] Amended by the 11th Amendment.

shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

[*Full Faith and Credit; Return of Escaped Slaves; New States: Territories; Guaranty of Republican Form of Government*]

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V

[*Provision for Amendments*]

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and

purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

[*Public Debts; Supremacy of the Constitution; No Religious Test for Office*]

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both

of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

[*Ratification*]

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth.

In witness whereof we have hereunto subscribed our names,

Go: WASHINGTON—Presidt.
and Deputy from Virginia

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

[*The Right of Persons*]

ARTICLE I [8]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[8] The first ten Amendments adopted in 1791.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X

[*The Rights of States*]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI [9]

[*Suits against States*]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[9] Adopted in 1798.

ARTICLE XII [10]

[*Change in Electoral System*]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose

[10] Adopted in 1804.

shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII [11]

[*Slavery Prohibited*]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[11] Adopted in 1865.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV [12]

[*Who Are Citizens*]

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[*Apportionment of Representatives and the Suffrage*]

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of

[12] Adopted in 1868.

age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

[*Exclusion of Certain Persons from Office*]

3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

[*Union and Confederate Debts*]

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be

questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV [13]

[*Right to Vote*]

SECTION 1. The right of citizens of the United States to vote shall not be denied, or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI [14]

[*Income Tax*]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

[13] Adopted in 1870.
[14] Passed July, 1909; proclaimed February 25th, 1913.

ARTICLE XVII [15]

[*Popular Election of Senators*]

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII [16]

[*National Prohibition*]

SECTION 1. After one year from the ratification

[15] Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same section as relates to the filling of vacancies; proclaimed May 31st, 1913.

[16] Passed both houses of Congress, December, 1917, ratified by the required number of states on January 16, 1919, and proclaimed to take effect January 16th, 1920.

of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided by the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX [17]

[*Woman Suffrage*]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

[17] Passed the House of Representatives, May 21st, 1919; passed the Senate, June 4th, 1919; proclaimed August 26th, 1920.

APPENDIX B

ACT JUNE 15TH, 1917, C. 30, TITLE XI, § 1

§ 1. *Search warrants, authority to issue.*

A search warrant authorized by this title may be issued by a judge of a United States district court, or by a judge of a state or territorial court of record, or by a United States commissioner for the district wherein the property sought is located.

§ 2. *Search warrant: grounds for issue.*

A search warrant may be issued under this title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the

person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When the property, or any paper, is possessed, controlled, or used in violation of section 22 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed.

§ 3. *Search warrants; probable cause and affidavit.*

A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

§ 4. *Search warrant; examination of applicant and witness; affidavits and depositions.*

The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

§ 5. *Search warrant; affidavits and depositions.*

The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

§ 6. *Search warrants; issue; contents.*

If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

§ 7. *Search warrants; service.*

A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

§ 8. *Search warrant; service; breaking and entering.*

The officer may break open any outer or inner door or window of a house, or any part of a house,

or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

§ 9. *Search warrant; service; breaking and entering to liberate detained person aiding in execution of warrant.*

He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein or when necessary for his own liberation.

§ 10. *Search warrant; service; daytime.*

The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

§ 11. *Search warrant; time for service and return.*

A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

§ 12. *Search warrant; copy and receipt for property to person from whom taken.*

When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

§ 13. *Search warrant; return; contents.*

The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

§ 14. *Search warrant; return; copy of, inventory for person from whom property taken.*

The judge or commissioner must thereupon, if

required, deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant.

§ 15. *Search warrant; taking testimony.*

If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness.

§ 16. *Search warrant; restoration of property taken; retention of custody of property by officer or other disposition.*

If it appears that the property or paper taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as the defendant described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law.

§ 17. *Search warrant; filing papers with clerk of court having jurisdiction.*

The judge or commissioner must annex the affidavits, search warrant, return, inventory, and evidence, and if he has not the power to inquire into the offense in respect to which the warrant was issued he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire.

§ 18. *Search warrant; obstructing, etc., service or execution, etc.; punishment.*

Whoever shall knowingly and willfully obstruct, resist, or oppose any such officer or person in serving or attempting to serve or execute any such warrant, or shall assault, beat, or wound any such officer or person, knowing him to be an officer or person so authorized, shall be fined not more than $1,000 or imprisoned not more than two years.

§ 19. *Search warrant; perjury and subornation of perjury.*

Sections one hundred and twenty-five and one hundred and twenty-six of the Criminal Code of the United States shall apply to and embrace all persons making oath or affirmation or procuring the same under the provisions of this title, and such persons

shall be subject to all the pains and penalties of said sections.

§ 20. *Search warrant; maliciously procuring issue; punishment.*

A person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000 or imprisoned not more than one year.

§ 21. *Search warrant; officer exceeding authority; punishment.*

An officer who in executing a search warrant willfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year.

§ 22. *Possession of property in and of foreign government*

Whoever in aid of any foreign government shall knowingly and willfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than two years or both.

§ 23. *Search warrant; existing laws not repealed.*

Nothing contained in this title shall be held to repeal or impair any existing provisions of law regulating search and the issue of search warrants.

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